

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

BELL ATLANTIC-PENNSYLVANIA, INC.	:	CIVIL ACTION
	:	
v.	:	
	:	
COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, LOCAL 13000, et al.	:	NO. 97-4179
	:	
Newcomer, J.	February	, 1998

M E M O R A N D U M

Presently before this Court are plaintiff Bell Atlantic-Pennsylvania, Inc.'s Cross-Motion for Summary Judgment, and defendants Communications Workers of America, AFL-CIO, Local 13000's and Communications Workers of America, District 13's response thereto. Also before this Court are defendants' Cross-Motion for Summary Judgment, and plaintiff's response thereto. The parties have also filed supplemental briefs pursuant to this Court's Order dated December 18, 1997. For the following reasons, the Court will grant plaintiff's Motion and deny the defendants' Motion.

I. Introduction

Plaintiff Bell Atlantic-Pennsylvania, Inc. ("Bell" or the "Company") has filed suit under 29 U.S.C. § 185, alleging that defendants Communications Workers of America, AFL-CIO, Local 13000 and Communications Workers of America, AFL-CIO, District 13 (collectively referred to as the "Union") violated the parties' collective bargaining agreement ("Agreement") by insisting on submitting their Article 39 dispute to regular arbitration under Section B1 of the Agreement rather than to expedited arbitration

pursuant to Sections 39.07 and B2. The Company asks this Court to enter a declaratory judgment that the Union's exclusive remedy with respect to the Article 39 dispute is through expedited arbitration under Section B2 of the Agreement and that the Union may not process the instant Article 39 Dispute in Section B1 regular arbitration.

In its Answer, the Union asserts that Section 39.07 of Article 39 permits it to elect between Section B2 expedited arbitration or Section B1 regular arbitration. It also argues, as a threshold matter, that the issue of whether it may arbitrate its Article 39 dispute in Section B1 regular arbitration should be decided by an arbitrator in this first instance because (1) the issue is one of procedural arbitrability, not substantive arbitrability, and (2) the Company has not exhausted the Agreement's grievance and arbitration procedure.

In order to provide the proper context for this opinion, the Court must first describe the relevant sections of the Agreement and then detail the underlying facts of the instant dispute between the parties.¹ Bell and the Union first ratified the Agreement between The Bell Company of Pennsylvania and Communications Workers of America, AFL-CIO, Local 13000 on May 17, 1943. The current Agreement is effective from August 6, 1995 to August 8, 1998. During the 1983 negotiations, the parties agreed to a new contract provision, subsequently called Article

1. The facts are undisputed unless otherwise noted.

39, that would allow Bell greater flexibility to reorganize and form new administrative work groups.

Article 39 states that employees will be placed in "administrative groups" for the purposes of overtime administration and selection of vacations and tours. (Agreement § 39.01). When Bell reorganizes administrative groups, a Bell representative is required to meet with a Union representative to bargain about the composition of the groups, the scheduling of tours, overtime procedures and vacation selection procedures. (Agreement § 39.04).

Section 39.05 sets forth the standards and requirements for any agreement reached on such issues:

Any agreement reached on such issues must be consistent with the provisions of the Agreement and with the economy of operation, good customer service, fairness to all employees in the group and consideration to the employees' wishes. Any agreement on overtime procedures must have a goal of accomplishing a reasonably equal distribution of overtime opportunities among all of the qualified employees in the group consistent with the letter of August 3, 1971.

(Agreement § 39.05). If no agreement is reached within 30 days, management is to implement the administrative procedures on the composition of the group, the scheduling of tours, overtime procedures and vacation selection procedures; such procedures implemented must be consistent with the standards and requirements of Section 39.05. (Agreement § 39.06). If Bell implements the procedures without the Union's Agreement, the Union may pursue expedited arbitration to determine the narrow

issue of whether the implemented procedures comply with the standards and requirements specified in Section 39.05.

Section 39.07 specifically enunciates that:

If management implements procedures without the agreement of the Union, the Union may submit to expedited arbitration the question whether the procedures implemented are in compliance with the standards and requirements listed in 39.05.

(Agreement § 39.07) (emphasis added). Article 39.07 does not permit a challenge to the underlying reorganization – only a challenge to the administrative procedures (such as overtime distribution and vacation selection procedures).²

Although Section 39.07 specifically refers to only expedited arbitration, the Agreement actually has two distinct and separate arbitration tracks - regular arbitration under Section B1 and expedited arbitration under Section B2. Looking beyond this two-track system, the Court discovers that the Agreement actually contains a multi-faceted dispute resolution scheme under which all disputes over the intent and meaning of the Agreement are subject to regular arbitration under Section B1 and certain other disputes are subject to one of the following alternative dispute mechanisms: (1) no arbitration; (2) expedited arbitration under Section B2; or (3) expedited arbitration if both parties agrees, otherwise the dispute goes to regular arbitration. In a side letter dated January 25, 1996, the

2. Only one dispute under Article 39 has been previously submitted to arbitration and that dispute was submitted to expedited arbitration pursuant to Sections 39.07 and B2.

parties also created a process for mediation of disputes under the Agreement. In the case of disputes over promotions under Article 22, the resolution procedure has changed over the years from no arbitration to expedited arbitration to regular arbitration.

Sections 10.06 and 10.07 provide that disputes over the intent or alleged breaches of the Agreement may be processed through the Grievance Procedure and that either Bell or the Union may process such a dispute to arbitration pursuant to Article 13.³

Section B1 of the Agreement sets forth the procedures for instituting and conducting regular arbitration. For example, Section B1 provides for the establishment of a three-member Board of Arbitration, which includes a Company and a Union representative and an impartial Chairman; these arbitrators are

3. Section 10.06 provides:

The Company may initiate grievances with the appropriate Union President or higher Union official. When the Company initiates a grievance, the same time limits will apply.

(Agreement § 10.06). Section 10.07 provides:

If, at any time, a controversy should arise between the Union and the Company regarding the true intent and meaning of any provision of this Agreement or regarding any claim that either party has not performed a commitment of this Agreement, the controversy may be presented for review in accordance with the preceding Sections of this Article [the Grievance Procedure]. If the controversy is processed under these Sections and is not satisfactorily settled, the Union or the Company, by written notice specifying the Section of the Agreement alleged to be violated, may submit the question under dispute to arbitration in accordance with the provisions of Article 13 of this Agreement.

(Agreement § 10.07).

selected in accordance with the Voluntary Labor Arbitration Rules of the American Arbitration Association (the "Rules").

(Agreement §§ B1.011 and B1.023). The arbitration is then conducted in accordance with the Rules, unless the procedure is otherwise set forth in Section B1. (Agreement § B1.024).

Article 13 emphasizes the limited scope of regular arbitration under the Agreement. Section 13.01 provides that "[t]here shall be arbitrated only the matters specifically made subject to arbitration by the provisions of this Agreement."

(Agreement § 13.01). Section 13.02 states that:

The procedure for arbitration is set forth in Exhibit B attached to and made a part of this Agreement. In making an award the Arbitration Board may not add to, subtract from, modify or disregard any contract provision. In no way shall this detract from the right of the Arbitration Board to interpret the meaning and application of any contract term in which the parties hereto are in dispute as to such meaning and application.

(Agreement § 13.02).

Beyond these limitations, the Agreement also explicitly excludes from arbitration disputes over certain provisions. For example, disputes over discharges or suspensions of employees with less than six months of continuous service may be processed through the grievance procedure but may not be arbitrated.

(Agreement § 11.02). Similarly, disputes over entitlement to benefits under Bell's Pension Plan or its Sickness and Accident Disability Benefit Plan are subject to the grievance procedure but may not be arbitrated. (Agreement § 16.02). Likewise,

disputes over the Company's Income Security Plan are expressly excluded from arbitration. (Agreement § 28.01).

Section B2 describes some of the circumstances under which expedited arbitration is required or may be elected. For example, if the Union desires to arbitrate grievances involving most employee suspensions, its must submit them to expedited arbitration:

In lieu of the procedures specified in Section B1 of this Agreement, any grievance involving the suspension of an individual employee, except those which also involve an issue of arbitrability, contract interpretation, or work stoppage (strike) activity and those which are also the subject of an administrative charge or court action shall be submitted to arbitration under the expedited arbitration procedure hereinafter provided within fifteen (15) days after the filing of a request for arbitration.

(Agreement § B2.01).

In contrast, if both parties so elect, expedited arbitration will apply to grievances involving other disciplinary actions, such as demotions for misconduct and discharges, which are specifically subject to arbitration under Article 11 of the Agreement. Id. Absent such a joint election, the grievance is expressly subject to regular arbitration pursuant to Sections 10.07 and B1.

Section B2 sets forth the procedures that will govern expedited arbitration - procedures which are vastly different from those procedures provided for in Section B2. Unlike B2 arbitrations, there is no tripartite panel in expedited arbitration; instead, cases are heard by a single umpire who is

selected from a pre-appointed panel of three neutral umpires and two alternates who serve on a rotational basis. (Agreement § B2.02). If the designated umpire is not available for a hearing within ten days after receiving an assignment, the case is assigned to the next available umpire. If no umpire can hear the case in ten days, the case is assigned to the umpire who can hear the case on the earliest date.

Section B2 provides that expedited arbitration hearings will be informal without formal rules of evidence and transcripts. (Agreement § B2.03(c)). Unlike normal arbitration hearings - which are conducted by attorneys for the parties with a formal transcription of the proceedings, expedited arbitrations normally are conducted by non-lawyer representatives of the parties without a transcription of the proceedings. (William C. Hart Decl. ¶ 14). Section B2.03(d) provides that the parties may submit a brief within five working days after the hearing and that the umpire must submit a decision within five working days after receipt of the briefs.

Other discernable differences exist between Sections B1 and B2. For example, the Company is liable for back pay for no more than six months plus any time that the Company has delayed the processing of the grievance in cases through expedited arbitration. There is no comparable limitation in regular arbitration cases under Section B1. Finally, unlike regular arbitration cases under Section B1, an umpire's decision in

expedited arbitration does not constitute precedent for other cases.⁴ (Agreement § B2.03(e)).

As explained above, the Agreement expressly provides for expedited arbitration of disputes relating to the issue of whether the Company properly implemented administrative procedures, such as overtime distribution and vacation selection procedures, following a reorganization of administrative groups. (Agreement § 39.07). Expedited arbitration may only be invoked if the Company and the Union, after negotiations, have failed within thirty days to reach agreement on what procedures to implement and the Company has implemented its proposed procedures. (Agreement §§ 39.04-.06). In expedited arbitration under Section 39.07, the umpire may only address whether the implemented procedures comply with the standards and requirements of Section 39.05, which lists factors such as economy of operation, good customer service, employees' wishes and the like.

Exhibit A to the Agreement contains Section A5.012(c) which is another provision that allows the Union to submit to expedited arbitration disputes over whether the Company has properly classified a temporary assignment of an employee as "commuting" or "non-commuting." The Company's decision, if challenged by the Union, is subject to expedited arbitration

4. This difference - lack of precedential effect of expedited arbitration decisions - is the main reason that the Union wishes to submit the current Article 39 dispute to regular arbitration. (Maisano Decl. ¶ 13).

under Section B2. Section A5.012 does not provide for optional recourse to regular arbitration under Section B1.⁵

Besides the dominant two-track arbitration system, the Agreement contains two other distinct dispute mechanisms - mediation of certain employee suspensions and discharges and the dispute resolution procedure for "Promotions" disputes under Article 22. In a letter dated January 25, 1996, the parties adopted an alternative dispute mechanism - mediation - for certain employee suspensions and discharges.⁶ The dispute resolution procedure under Article 22 has evolved over the years from resolution through only the grievance procedure but without arbitration to resolution in expedited arbitration to its current form which allows regular arbitration.

Against the backdrop of the Agreement and its multi-faceted dispute resolution system, the parties recently became entangled in a dispute that implicated Article 39 of the Agreement. In early February 1997, Bell announced a Network Operations reorganization in the Philadelphia Metropolitan Area. As part of this reorganization, the Company announced the

5. In the two instances where the Union has demanded arbitration of a dispute involving A5.012, the grievances were submitted to expedited arbitration. (Hart Decl. ¶ 16).

6. Under this procedure, if both parties agree to resolve the suspension or discharge through mediation, a mediator is assigned to the dispute. If mediation is not successful, the mediator issues a final and binding decision which carries no precedential value. If one party requests mediation but the other does not agree to mediate the dispute, the dispute is handled pursuant to normal arbitration procedures.

formation of two new organizations called the Centralized Power Organization Administrative Group ("Power Group") and the Central Office Installation and Cutover Administrative Group ("Cutover Group"). Both of these new groups were composed of employees classified as Switching Equipment Technicians ("SETs") who were given a new centralized reporting location and who were assigned duties that had formerly been performed by SETs working in the various local offices in Eastern Pennsylvania.

The Union claimed that formation of the Power Group and the Cutover Group violated the Agreement in several respects. With respect to the Power Group, the Union alleged that: (1) the Company refused to accept volunteers for the Power Group but was force-transferring SETs into the Power Group in violation of Section 18.031 of the Agreement; (2) the Company was requiring all SETs in the Power Group to work more than 26 undesirable tours in violation of Section A2.022 of the Agreement; (3) the overtime procedures for the group violated the overtime equalization letter of August 3, 1971 attached to the Agreement; and (4) the Company was refusing to define the duties of the SETs in the group in violation of Article 8 of the Agreement. The Union alleged that the formation of the Cutover Group violated the Agreement in two respects: (1) the Company refused to accept volunteers for this group but was force-transferring SETs into the group in violation of Section 18.031 of the Agreement and (2) that the Company was refusing to define the duties of the SETs in the group in violation of Article 8 of the Agreement.

On or about February 21, 1997, pursuant to Article 39.04, the Company began bargaining with the Union over the administrative procedures, and the Union's objections to these procedures, relating to the Network Operations reorganization in the Philadelphia Metropolitan Area. (Hart Decl. ¶ 9). After the parties reached an impasse in the bargaining, the Company implemented its final proposal pursuant to Section 39.06. (Hart Decl. ¶ 10).

On May 9, 1997, Vincent Maisano, International Vice President, District 13, sent an arbitration demand letter to William C. Hart, plaintiff's Director of Labor Relations. In that letter, defendants "charge[d] a violation of Article(s) 39 and other sections of the agreement which may be relevant, as per our letter to you dated April 15, 1981 [sic]." Defendant's letter also said, "We have opted not to use our option in Article 39.07 but choose to use the full arbitration procedure." Id.

The Company responded by letter dated May 30, 1997, asserting that the Union was entitled only to Section B2 expedited arbitration not to full arbitration under Section B1. The Company gave the Union the option of using Section B2 expedited arbitration or withdrawing its grievance. In a letter dated June 2, 1997, the Union refused to withdraw its grievance, asserting that Section 39.07 provided the right to regular arbitration.

The Company subsequently filed suit in this Court, alleging that defendants had violated the Agreement by insisting

on pursuing the Article 39 dispute in regular arbitration under Section B1. The plaintiff seeks a declaration that the Union's exclusive recourse for an Article 39 dispute is to use Section B2 expedited arbitration. The defendants subsequently filed an answer and counterclaim to plaintiff's Complaint. The Union denied that the Agreement mandates Section B2 expedited arbitration for Article 39 disputes. In addition, the Union counterclaimed, seeking a determination that the instant dispute can be resolved through regular arbitration.

The parties have now filed cross-motions for summary judgment. In its motion, Bell submits that this Court should enter a declaratory judgment that the Union's exclusive remedy with respect to the Article 39 dispute is through expedited arbitration under Section B2 of the Agreement and that the Union may not process the instant Article 39 Dispute in Section B1 regular arbitration. The Company's argument in support of its position is relatively uncomplicated. In essence, the Company submits that the word "may" in Section 39.07 is not permissive language that allows the Union the option of arbitrating Article 39 disputes using Section B1 arbitration or Section B2 arbitration. Instead, the Company contends that the word "may" is mandatory, i.e., if the Union wants to arbitrate an Article 39 dispute, it must take the dispute to Section B2 expedited arbitration or abandon its claim.

In its cross-motion and response, the Union argues that this Court cannot consider the merits of the instant dispute -

whether the word "may" is permissive or mandatory - because the issue is one of procedural arbitrability, not substantive arbitrability, and the Company has not exhausted the Agreement's grievance and arbitration procedure. In response, the Company contends that the issue before this Court is one of substantive arbitrability as opposed to procedural arbitrability and that it does not have to exhaust the grievance and arbitration procedure contained in the Agreement.

The Court will address these issues seriatim.

II. Summary Judgment Standard

The standards by which a court decides a summary judgment motion do not change when the parties file cross motions. Southeastern Pa. Transit Auth. v. Pennsylvania Pub. Util. Comm'n, 826 F. Supp. 1506 (E.D. Pa. 1993). A reviewing court may enter summary judgment where there are no genuine issues as to any material fact and one party is entitled to judgment as a matter of law. White v. Westinghouse Electric Co., 862 F.2d 56, 59 (3d Cir. 1988). "The inquiry is whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one sided that one party must, as a matter of law, prevail over the other." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). The evidence presented must be viewed in the light most favorable to the nonmoving party. Id. at 59.

The moving party has the initial burden of identifying evidence which it believes shows an absence of a genuine issue of

material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986); Childers v. Joseph, 842 F.2d 689, 694 (3d Cir. 1988). The moving party's burden may be discharged by demonstrating that there is an absence of evidence to support the nonmoving party's case. Celotex, 477 U.S. at 325. Once the moving party satisfies its burden, the burden shifts to the nonmoving party, who must go beyond its pleading and designate specific facts by use of affidavits, depositions, admissions, or answers to interrogatories showing there is a genuine issue for trial. Id. at 324. Moreover, when the nonmoving party bears the burden of proof, it must "make a showing sufficient to establish the existence of [every] element essential to that party's case." Equimark Commercial Fin. Co. v. C.I.T. Fin. Servs. Corp., 812 F.2d 141, 144 (3d Cir. 1987) (quoting Celotex, 477 U.S. at 322).

Summary judgment must be granted "against a party who fails to make a 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." White, 862 F.2d at 59 (quoting Celotex, 477 U.S. at 322). The nonmovant must specifically identify evidence of record, as opposed to general averments, which supports his claim and upon which a reasonable jury could base a verdict in his favor. Celotex, 477 U.S. at 322. The nonmovant cannot avoid summary judgment by substituting "conclusory allegations of the complaint . . . with conclusory allegations of an affidavit." Lujan v. National Wildlife Found., 497 U.S. 871, 888 (1990). The motion must be denied only when

"facts specifically averred by [the nonmovant] contradict facts specifically averred by the movant." Id.

III. Standards for Determining Arbitrability

When a federal trial court is faced with the question of arbitrability, its function is delimited by the Supreme Court's teachings of the Steelworker's Trilogy⁷ as restated in AT&T Technologies, Inc. v. Communications Workers of America, 475 U.S. 643, 106 S. Ct. 1415, 89 L. Ed. 2d 648 (1986). First, although federal policy favors arbitration of disputes between a union and an employer, the federal courts have made it clear that "'arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to so submit.'" AT&T, 475 U.S. at 648, 106 S. Ct. at 1418 (quoting Warrior & Gulf Navigation Co., 363 U.S. at 582, 80 S. Ct. at 1352). See also United Steelworkers of America v. Lukens Steel Co., 969 F.2d 1468, 1473 (3d Cir. 1992) (quotation omitted). Second, "[u]nless 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, 106 S. Ct. at 1475. See also Lukens Steel, 969 F.2d at 1473-74 (quotation omitted). Finally, "in deciding whether the parties have agreed to submit a particular grievance

7. United Steelworkers of America v. American Mfg. Co., 363 U.S. 564, 80 S. Ct. 1343, 4 L. Ed. 2d 1403 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960); United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 80 S. Ct. 1358, 4 L. Ed. 2d 1424 (1960).

to arbitration, a court is not to rule on the potential merits of the underlying claims." AT&T, 475 U.S. at 649, 106 S. Ct. at 1419. See also Lukens Steel, 969 F.2d at 1474. In applying these principles to a particular bargaining agreement, the "courts must carefully analyze the contractual language to determine whether a particular dispute is arbitrable." Morristown Daily Record v. Graphic Communications Union, Local 8N, 832 F.2d 31, 33 (3d Cir. 1987).

IV. Discussion

The ultimate issue before this Court is whether the word "may" in Section 39.07 is permissive or mandatory. Section 39.07 provides that "the Union may submit to expedited arbitration the question whether the procedures implemented are in compliance with the standards and requirements listed in 39.05." (Agreement § 39.05) (emphasis added). Relying on case law and the Agreement itself, the Company contends that this language is mandatory and that the Union must submit Article 39 claims to expedited arbitration or abandon its claim. In contrast, the Union contends that this language is permissive and that it can either submit Article 39 claims to expedited arbitration or submit these claims to regular arbitration. Before this issue can be reached, the Court must first address the two threshold issues of whether the issue presented is one of procedural arbitrability or substantive arbitrability and whether the Company is required to exhaust the Agreement's grievance and arbitration procedure.

In support of its position that the issue before this Court is one of procedural arbitrability, the Union essentially makes the following argument. The Union argues that there is no issue for this Court to decide because the Company has conceded the arbitrability of the underlying dispute, noting that the Company agrees that the Union's claim can be resolved through expedited arbitration under Sections 39.07 and B2. In other words, the Union contends that the substantive arbitrability question - whether the subject matter of the grievance is arbitrable - has been answered by the Company's concession that the dispute is arbitrable under Sections 39.07 and B2. The Union thus concludes that the only issue that remains to be decided is one of procedural arbitrability, i.e., what arbitration procedure should be utilized to resolve the underlying dispute - expedited or regular? Although the Union's logic is superficially appealing, upon closer examination, the Court finds it to be without substance.

In contrast to the Union's conclusion, the Court finds that the issue presented is one of substantive arbitrability, not procedural arbitrability. A substantive arbitrability question asks whether the particular subject matter of a dispute between the employer and the union is covered by an arbitration clause. See Trap Rock Industries, Inc. v. Local 825, Int'l Union Operating Engineers, AFL-CIO, 982 F.2d 884, 888 (3d Cir. 1992) (citations omitted). This general substantive arbitrability question is the exact question posed in this case. Although the

parties agree that Section 39.07 specifically permits them to submit Article 39 disputes to expedited arbitration, the Union and the Company dispute whether Section 39.07 allows them to submit Article 39 disputes to regular arbitration. On the one hand, the Union argues that the word "may" permits it to submit Article 39 grievances to regular arbitration, while on the other hand the Company disputes that an Article 39 dispute may go to arbitration. Examined in this light, the issue presented is whether the Company agreed to arbitrate Article 39 disputes through Section B1 regular arbitration - a question of substantive arbitrability. The true question presented here is whether the subject matter of the parties' dispute (Article 39 disputes) is covered by B1 regular arbitration.

This case simply does not involve, as the Union contends, a procedural issue, such as timeliness or exhaustion, where there is no dispute over whether the subject matter of the dispute is within the scope of an arbitration clause. The cases cited by the Union all deal with situations wherein the parties disputed whether a procedural requirement - such as timeliness or exhaustion - had been satisfied. More importantly, in the cases cited by the Union, the parties therein all agreed that the subject matter of the parties' dispute was covered by the arbitration clause in question; in essence, none of these cases presented a true substantive arbitrability issue. Thus, the reasoning of all of these cases is simply inapplicable to the case sub judice. Here, the dispute is substantive because the

parties dispute whether the subject matter of the instant dispute is covered and/or excluded from regular arbitration under Sections 10.07 and B1.

It is also irrelevant for the purposes of determining whether the issue presented is one of substantive arbitrability that the Agreement provides two different arbitration procedures. Although the Agreement provides two different arbitration procedures, the threshold question presented, regardless of which procedure the party attempts to utilize, is whether the particular arbitration clause covers the subject matter of the particular dispute between the parties. As demonstrated by the Agreement itself, the parties actually intended certain disputes to be processed through regular arbitration and other disputes to be processed through expedited arbitration. However, the threshold question always presented is whether the particular arbitration clause covers the particular dispute. This question, of course, is a substantive arbitrability question.

Because all questions of substantive arbitrability are to be decided by the Court, not the arbitrator, see AT&T, 475 U.S. at 649, 106 S. Ct. at 1418-19 ("[u]nder our decisions, whether or not the company was bound to arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties") (internal quotations and citations omitted), this Court must decide whether the parties' Article 39 dispute is to be processed through regular arbitration or expedited arbitration. However, before reaching this issue, the

Court must address the Union's contention that this issue should be decided by an arbitrator in this first instance because the Company has not exhausted the Agreement's grievance and arbitration procedure.

As stated above, it is axiomatic that issues of substantive arbitrability are for the courts, not arbitrators. Thus, as the Supreme Court stated in AT&T: "[u]nless 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, 106 S. Ct. at 1418; Trap Rock Industries, 982 F.2d at 888. In this case, the question is one of substantive arbitrability, thus the Union must demonstrate that it and the Company have clearly and unmistakably provided that the arbitrator can decide questions of substantive arbitrability. The Union simply cannot do so. The fact that the Company has the right to initiate grievances under the grievance and arbitration procedure hardly constitutes a clear and unmistakable waiver of its right to have a court decide the issues of substantive arbitrability. As a matter of law, a general agreement to arbitrate disputes is insufficient evidence of a clear and unmistakable intent to submit substantive arbitrability issues to an arbitrator. See AT&T, 475 U.S. at 649, 106 S. Ct. at 1418.⁸ Thus, the Court finds that the Company

8. In AT&T, the Supreme Court went on to explain that arbitrators generally should not determine the scope of his or her own jurisdiction. Indeed, a significant concern expressed by
(continued...)

does not have to submit the instant substantive arbitrability question to the grievance and arbitration provided for in the Agreement before filing suit.

Turning to the merits of the instant case, the Court concludes that the Agreement mandates that the parties must submit Article 39 disputes, such as the underlying dispute here, to Section B2 expedited arbitration or they cannot arbitrate the dispute at all. Section 39.07, as stated above, provides that "[i]f management implements procedures without the agreement of the Union, the Union may submit to expedited arbitration the question whether the procedures implemented are in compliance

8. (...continued)

the Court was that, if arbitrators were allowed to determine their own jurisdiction, parties would be less inclined to enter into agreements to arbitrate. Specifically, the Court stated:

The willingness of parties to enter into agreements that provide for arbitration of specified disputes would be "drastically reduced," however, if a labor arbitrator had the "power to determine his own jurisdiction" Cox, Reflections Upon Labor Arbitration, 72 Harv. L. Rev. 1482, 1509 (1959). Were this the applicable rule, an arbitrator would not be constrained to resolve only those disputes that the parties have agreed in advance to settle by arbitration, but, instead, would be empowered "to impose obligations outside the contract limited only by his understanding and conscience." Ibid

AT&T, 475 U.S. at 651, 106 S. Ct. at 1419.

In this case, where there simply is not a clear and unmistakable waiver of the right to have a court decide questions of substantive arbitrability, an arbitrator cannot be permitted to determine whether the parties agreed to submit Article 39 disputes to regular arbitration. If the arbitrator was allowed to determine this question, the arbitrator, in effect, would be defining his own jurisdiction. Such a result would be directly in opposition to the Supreme Court's admonition against having arbitrators determine their own jurisdiction and would possibly deter other Unions and employees from entering into such agreements to arbitrate. This result the Court cannot condone.

with the standards and requirements listed in 39.05." (Agreement § 39.05). Based on case law and the parties' Agreement, the word "may" in Section 39.07 means that, if the Union wishes to arbitrate an Article 39 dispute, it must process that dispute through Section B2 expedited arbitration or abandon its claim.

In the context of arbitration clauses in collective bargaining agreements, the Third Circuit Court of Appeals and other circuits have held that the word "may" is not a word of permission but rather a word of mandate. See, e.g., United Steelworkers of America, AFL-CIO v. Fort Pitt Steel Casting, 598 F.2d 1273, 1279 (3d Cir. 1979); Ceres Marine Terminals v. International Longshoremen's Assoc., Local 1969, 683 F.2d 242, 246-47 (7th Cir. 1982). In Fort Pitt, the Third Circuit specifically addressed whether the word "may," in the context of an arbitration clause, allowed the employer, which claimed that the Union had violated the collective bargaining agreement by failing to reimburse it for health insurance contribution paid during a strike, to forego arbitration and exercise "self-help." The Third Circuit held that the word "may" was mandatory, not permissive, and required the employer to arbitrate rather than resort to self-help:

We are unpersuaded by Fort Pitt's claim that it acted properly because for it, arbitration was permissive, not mandatory. Fort Pitt interprets ¶ 97 of the Agreement - which states that "[t]he grievance procedure may be utilized by the Company" - as allowing it to seek arbitration or not as it wishes. . . . The problem with the Company's approach is that the parts of the Agreement dealing with the grievance procedures applicable to employees also use the permissive word

"may". Yet, the Company asserts that the grievance mechanism is obligatory for the Union. If, as Fort Pitt contends, the grievance procedures are indeed mandatory for the Steelworkers despite the permissive language of the Agreement, we cannot say that the district court committed plain error in finding that those procedures are also mandatory for the Company.

598 F.2d at 1279 (footnotes omitted).

Other Courts have also held that the word "may" in an arbitration clause is mandatory, not permissive. For example, in Ceres Marine, the Seventh Circuit explained that "may," in the context of a collective bargaining agreement's arbitration clause, is an all or nothing proposition, i.e., the party had to either arbitrate its claim or abandon it. The word "may" simply did not mean that the party could bypass arbitration and sue in court. Likewise, the Eight Circuit, in Bonnot v. Congress of Independent Unions Local # 14, 331 F.2d 355 (8th Cir. 1964), applied similar reasoning in holding that the word "may," in the context of an arbitration provision, is mandatory, not permissive. The collective bargaining agreement provided that "either party may request arbitration" of differences regarding the interpretation of the agreement between the employer and any union member. Id. at 356. The union sought to go directly to court to enforce the collective bargaining agreement against the employer, arguing that the word "may" permitted the union to elect arbitration or a court claim. The court held that the word "may" in the arbitration clause provided no such election:

We should mention, perhaps, the union's suggestion that the bargaining agreement does not compel arbitration but only provides that either party "may" request it;

that it is thus permissive and optional; and that neither it nor the contractor elected to arbitrate. The result claimed to follow is that the arbitration here is not mandatory. We think the result is necessarily the other way. The obvious purpose of the "may" language is to give an aggrieved party the choice between the arbitration or the abandonment of its claim.

Id. at 359.

In this case, as in Fort Pitt, Ceres and Bonnot, the word "may" in Section 39.07 is mandatory, not permissive and optional. Under Section 39.07, the Union must choose Section B2 expedited arbitration or forego arbitration of its Article 39 dispute altogether. There simply exists no contrary indication in Section 39.07 that the word "may," as the Union suggests, allows the Union an election of Section B1 or Section B2 arbitration of Article 39 disputes. Indeed, the Union fails to point to any evidence that would establish that the word "may" was intended by the parties to be permissive. Instead, Section 39.07 specifically identifies expedited arbitration as the type of arbitration through which Article 39 disputes should be processed. By specifically naming expedited arbitration as the means for resolving Article 39 disputes that are not settled during negotiations, Section 39.07 intended to make Section B2 expedited arbitration that exclusive arbitral forum for resolution of Article 39 disputes.

Similar "may" language in the Agreement provides support to this Court's determination that word "may" in Section 39.07 is mandatory. Section 10.07, which sets forth the general

scope of the regular arbitration clause, also uses the word "may" in conjunction with the Union or the Company bringing a grievance to arbitration. (Agreement § 10.07).⁹ The intent of the word "may" in Section 10.07 is obvious from its context - the parties are not required to pursue grievances through the grievance or arbitration procedure; they "may" do so if they choose. However, they may not pursue such a grievance in court, notwithstanding the use of the word "may." This fact is simply undisputed by the Union. Thus, if the word "may" allowed election of forums, the Union could file suit in federal court for each alleged Company violation of the Agreement. As the parties are aware, such a result would be absurd. Instead, the word "may" in Section 10.07 refers to an exclusive procedure - the grievance and arbitration procedure - that the Company and the Union must utilize to redress certain alleged violations of the Agreement. Likewise, the word "may" in Section 39.07 refers to an exclusive procedure which the Union must pursue if it challenges the Company's implementation of administrative procedures under Article 39.

Finally, a review of the entire Agreement demonstrates that, if the parties intended an election of arbitration remedies under Section 39.07 for Article 39 disputes, they would have inserted language to that effect in the Agreement. Admittedly, the Agreement establishes that the parties were capable of expressly providing for an election of arbitration procedures.

9. See supra note 3 for the text of Section 10.07.

Section B2 itself contains language allowing the parties to elect either Section B1 or B2 arbitration. (Agreement § B2.01). The language of Section B2 shows that the parties were quite capable of drafting contract language expressly allowing an election between Section B1 regular arbitration or Section B2 expedited arbitration. The parties simply failed to provide such an election in Section 39.07. Instead, Section 39.07 refers only to expedited arbitration. Accordingly, the proper interpretive inference to be drawn is that the Union may not elect regular arbitration to process Article 39 disputes.

In sum, based on the case law, the language of Section 39.07 itself and the Agreement as a whole, the Court finds that the word "may" in Section 39.07 is a word of mandate, not permission. As such, the Court finds that the Union must process the current Article 39 dispute through Section B2 expedited arbitration or abandon its claim.

IV. Conclusion

Accordingly, for the foregoing reasons, the Court will grant Bell's Motion and deny the Union's Motion. The Court will enter judgment in favor of Bell and against the Union on the declaratory judgment count in Bell's Complaint and on defendants' counterclaim. Finally, the Court will enter a declaratory judgment that plaintiff's and defendants' exclusive remedy with respect to the Article 39 dispute is through expedited arbitration under Section B2 of the Agreement.

An appropriate Order so follows.

Clarence C. Newcomer, J.

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

BELL ATLANTIC-PENNSYLVANIA, INC.	:	CIVIL ACTION
	:	
v.	:	
	:	
COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, LOCAL 13000, et al.	:	NO. 97-4179

O R D E R

AND NOW, this day of February, 1998, upon consideration of the following Motions, and any responses thereto, it is hereby ORDERED that:

1. Plaintiff Bell Atlantic-Pennsylvania, Inc.'s Cross-Motion for Summary Judgment is GRANTED;
2. Defendants Communications Workers of America, AFL-CIO, Local 13000 and Communications Workers of America, District 13's Cross-Motion is DENIED;
3. JUDGMENT is ENTERED in favor of plaintiff and against defendants on the declaratory judgment count of plaintiff's Complaint and defendants' counterclaim;
4. Plaintiff's and defendants' exclusive remedy with respect to the Article 39 dispute is through expedited arbitration under Section B2 of the collective bargaining agreement; and
5. The Clerk of the Court shall mark this case CLOSED.

AND IT IS SO ORDERED.

Clarence C. Newcomer, J.