UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

CINCINNATI INCORPORATED,	:	Case No. 1:14-cv-296
Plaintiff,	:	Judge Timothy S. Black
vs.	:	
CINCINNATI SHAPER INDEPENDENT UNION,	:	
Defendant.	:	

ORDER DENYING PLAINTIFF CINCINNATI INCORPORATED'S MOTION FOR SUMMARY JUDGMENT (Doc. 9)

This civil action is before the Court on Plaintiff Cincinnati Incorporated's Motion for Summary Judgment (Doc. 9) and the parties' responsive memoranda (Docs. 10, 11, 12).

I. STATEMENT OF THE CASE

Plaintiff Cincinnati Incorporated filed this declaratory judgment action against Defendant Cincinnati Shaper Independent Union on April 10, 2014, seeking a declaration that it is not obligated to arbitrate a pending grievance under the parties' collective bargaining agreement. (Doc. 1). Alternatively, Plaintiff seeks a declaration that its obligation to arbitrate is limited to a specific portion of that grievance.

II. UNDISPUTED FACTS

1. Plaintiff Cincinnati Incorporated (the "Company") operates a facility in Harrison, Ohio that manufactures machine tools. (Doc. 1 at ¶ 3; Doc. 3 at ¶ 3).

2. Defendant Cincinnati Shaper Independent Union (the "Union") is an independent labor organization that represents the Company's hourly production and

maintenance employees at the Harrison, Ohio facility (the "Bargaining Unit"). (Doc. 1 at ¶ 4; Doc. 3 at ¶ 4).

3. The Company and the Union are parties to a collective bargaining agreement ("CBA") covering the Bargaining Unit that is effective from April 18, 2013 through October 15, 2016. (CBA).[1]

4. Under Article II, Section 1 of the CBA, a "grievance" is "a dispute or difference between the Company and the Union, or between the Company and an employee or group of employees, involving the application or interpretation of any express provision of this Agreement." (*Id.* art. II, § 1).

5. Article III, Section 1 of the CBA says that the Union may appeal unresolved grievances to arbitration. (*Id.* art. III, § 1).

6. Article VII, Section 6 of the CBA provides:

> An employee shall lose his seniority and cease to be an employee for any one of the following reasons:
>
> A. He quits.
> B. He is discharged.
> C. He retires
> . . . .
> H. His leave of absences exceeds two (2) years.

(*Id.* art. VII, § 6).

7. The parties' previous CBA had identical "loss of seniority upon retirement" language as the 2013 CBA: both provide that an employee who retires "shall lose his seniority and cease to be an employee." (Doc. 9-2 at ¶ 9, Ex. A art. VI, § 6).

8. The parties agree that there is no bargaining history, past practice, side agreement, or understanding that would affect the interpretation or application of the seniority provision. (Doc. 9-1, Ex. A at ¶ 2).

9. An arbitrator has no authority to change the seniority provision or any other provision in the CBA. Article III, Section II of the CBA expressly says that an arbitrator "shall have no authority to add to, subtract from or alter any of the terms of this Agreement." (CBA art. III, § 2).

10. Kennith Keith was employed by the Company in the Bargaining Unit from September 1974 until the Company terminated his employment on November 8, 2013. (Doc. 1 at ¶ 13; Doc. 3 at ¶ 13).

[1] The CBA is Doc. 1, Ex. A.

11. On November 14, 2013, the Union filed a grievance under the CBA over the Company's discharge of Keith (the "Grievance"). (Doc. 1 at ¶ 14, Ex. B; Doc. 3 at ¶ 14).

12. On December 16, 2013, over a month after the Union filed a grievance over Keith's discharge, Keith filed an application for early retirement under the Cincinnati Incorporated Employees' Retirement Pension Plan ("Pension Plan"), a defined benefit pension plan sponsored by the Company for the benefit of Bargaining Unit and other Company employees. (Doc. 1 at ¶¶ 14, 16, Ex. C; Doc. 3 at ¶¶ 14, 16).

13. On December 17, 2013, in accordance with Keith's application, the Company authorized the Pension Plan's fiduciaries to make the retirement payments to Keith as set forth in the Pension Plan commencing on January 1, 2014. (Doc. 1 at ¶ 17, Ex. D; Doc. 3 at ¶ 17).

14. The Company never discussed with Keith or the Union the potential effect of Keith's retirement on the Grievance before it processed Keith's retirement application. Nothing in the CBA or any other governing document obligated the Company to do so. (Doc. 9-2 at ¶ 7).

15. Keith was a Union officer for approximately 25 years (from 1988 to 2012). He was Vice President of the Union from 2003 to 2005 and President of the Union from 2005 to 2012. (Doc. 9-1, Ex. B at ¶ 2).

16. Keith participated in the negotiations for the 2009 CBA. (*Id.* at ¶ 3).

17. Keith has received his restricted lump sum retirement payment in the amount of $130,642.97 and is receiving monthly annuity payments in the amount of $808.23 per month, commencing January 2014. (Doc. 1 at ¶ 18; Doc. 3 at ¶ 18).

18. On January 10, 2014, the Company denied the Grievance. (Doc. 1 at ¶ 19, Ex. E; Doc. 3 at ¶ 19).

19. On January 15, 2014, the Union notified the Company of its "intent to arbitrate the termination of Mr. Ken Keith." (Doc. 1 at ¶ 20, Ex. F; Doc. 3 at ¶ 20).

20. On January 31, 2014, the Company informed the Union of its position that the Grievance is not arbitrable, due to Keith's decision to retire effective January 1, 2014, which ended his seniority and employment under Article VII, Section 6(C) of the CBA. (Doc. 1 at ¶ 21, Ex. G; Doc. 3 at ¶ 21).

21. Around February 12, 2014, the Union informed the Company that it intended to proceed to arbitration of the Grievance, despite Keith's retirement. (Doc. 1 at ¶ 22; Doc. 3 at ¶ 22).

22. On February 20, 2014, without waiving its position that the Grievance is not arbitrable, the Company offered to arbitrate the Grievance as long as the Union and Keith agreed in writing that (a) the remedy, if any, would be limited to back pay through December 31, 2013 and (b) the Arbitrator's decision would be final and binding as to any and all claims for breach of the CBA relating to Keith's discharge. (Doc. 1 at ¶ 23, Ex. H; Doc. 3 at ¶ 23).

23. On March 7, 2014, the Union rejected the Company's offer to arbitrate with the limitations proposed by the Company, and restated its intent to move forward with arbitration of the Grievance without "preconditions." The Union denies that the Grievance remedies are affected by Keith's retirement. (Doc. 1 at ¶ 24, Ex. I; Doc. 3 at ¶ 24).

24. The pending Grievance seeks back pay for periods of time both before and after the effective date of Keith's retirement, and reinstatement, despite Keith's retirement. (Doc. 1 at ¶ 24; Doc. 3 at ¶ 24).

25. At no point since Keith elected to retire has he made any attempt to undo his retirement. Instead, he continues to receive his ongoing retirement benefits. Through December 31, 2014, Keith received $140,341.73 in retirement payments from the Company's Pension Plan. (Doc. 9-2 at ¶¶ 5-6.).

III. STANDARD OF REVIEW

A motion for summary judgment should be granted if the evidence submitted to the Court demonstrates that there is no genuine issue as to any material fact, and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The moving party has the burden of showing the absence of genuine disputes over facts which, under the substantive law governing the issue, might affect the outcome of the action. *Celotex*, 477 U.S. at 323. All facts and inferences must be construed in the light most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

A party opposing a motion for summary judgment "may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 248.

IV. ANALYSIS

The parties each argue that the clear and unambiguous language of the CBA supports its respective position of whether the Grievance is subject to arbitration. The Company contends that the Grievance is not arbitrable because Keith's retirement ended his seniority and employment. Alternatively, the Company argues that an arbitrator may only award back pay for the six weeks between Keith's termination and his retirement. The Union maintains that the Keith's retirement had no effect on the Company's obligation to arbitrate the Grievance.

Collective bargaining agreements are interpreted according to ordinary principles of contract law, at least to the extent those principles are not inconsistent with federal labor policy. *M & G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926, 933 (2015). Here, the Court acts "against the backdrop of a federal policy supporting a presumption of arbitrability in the labor-law context. The presumption in favor of arbitration applies with particular force in labor disputes between an employer and a union." *Teamsters Local Union 480 v. United Parcel Serv., Inc.*, 748 F.3d 281, 288 (6th Cir. 2014). The following principles guide the analysis of whether the Grievance is subject to arbitration:

> (1) a party cannot be forced to arbitrate any dispute that it has not obligated itself by contract to submit to arbitration; (2) unless the parties clearly and unmistakably provide otherwise, whether a collective bargaining agreement creates a duty for the parties to arbitrate a particular grievance is an issue for judicial determination; (3) in making this determination, a court is not to

> consider the merits of the underlying claim; and (4) where the agreement contains an arbitration clause, the court should apply a presumption of arbitrability, resolve any doubts in favor of arbitration, and should not deny an order to arbitrate "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute."

Teamsters Local Union No. 89 v. Kroger Co., 617 F.3d 899, 904 (6th Cir. 2010) (quoting *United Steelworkers of Am. v. Mead Corp.*, 21 F.3d 128, 131 (6th Cir. 1994)). The Company does not challenge the Union's position that the CBA contains a broad arbitration clause. Accordingly, there is a "strong presumption of arbitrability." *Id.* at 905. When a party argues that a grievance is outside the scope of a broad arbitration clause, "only an express provision excluding a particular grievance from arbitration or the most forceful evidence of a purpose to exclude the claim from arbitration can prevail." *Id.*

First, the Company argues that the Grievance is not arbitrable because Keith retired. The Company relies primarily on Article VII, Section 6(C), which provides that "[a]n employee shall lose his seniority and cease to be an employee" if, *inter alia*, "he retires." (CBA art. VII, § 6(C)). Additionally, pursuant to Article III, Section 2, the arbitrator has "no authority to add to, subtract from or alter any of the terms" of the CBA. (*Id.*, art. III, § 2). Therefore, the Company reasons, the Grievance is expressly excluded from arbitration under the clear terms of CBA. The Company does not offer any evidence of a purpose to exclude the Grievance from arbitration.

The Court finds that the Company has not overcome the strong presumption of arbitrability. The CBA defines a "grievance" as "a dispute or difference between the

Company and the Union, or between the Company and an employee or group of employees, involving the application or interpretation of any express provision of this Agreement." (CBA art. II, § 1). If a grievance is denied at step three of the grievance procedure, "the Union may then request arbitration when applicable under Article III, Arbitration." (*Id.* art II, § 3). Article III provides that "[t]he arbitrator shall confine his consideration to the specific issue or issues expressly raised by the grievance . . . and the Arbitrator shall not consider any specific issue or issues not expressly raised by the grievance or expressly excluded from the Grievance Procedures or Arbitration in this Agreement." (CBA art. III, § 2). The CBA describes the arbitrator's authority as follows:

> The Arbitrator's decision and award shall be final and binding; however, he shall have no authority to add to, subtract from or alter any of the terms of this Agreement, and shall have no authority to substitute his judgment for that of the Company in the exercise of its rights. In all cases of disciplinary action arbitrated after the execution date of this Agreement, including discharge cases, the Arbitrator's sole task shall be to determine whether the employee engaged in the activity with which he is charged. The Arbitrator shall have no authority to review or change the degree or kind of discipline imposed by the Company. Notwithstanding any other provision of this agreement, the provisions of this Section set forth the sole standard of review to be applied in any arbitrations involving discipline and the Arbitrator shall have no authority to apply a just cause or reasonable cause standard to any arbitration conducted under this Agreement or any prior Agreement of the parties. The parties expressly intend to overrule any and all prior arbitration discussions applying or implying a just cause or reasonable cause standard for discipline. Only if the Arbitrator determines that the employee did not engage in the activity with which he is charged, the discipline shall be removed and the employee shall be provided his net back pay. This Section shall apply to all grievances and arbitrations pending as of the date of this Agreement and to all future grievances and arbitrations.

(*Id.*)

Article III specifically contemplates that some disputes between the Company and the Union may be exempted from the grievance and arbitration provisions by other sections of the CBA: "the Arbitrator shall not consider any specific issue . . . expressly excluded from the Grievance Procedures or Arbitration in this Agreement." (CBA art. III, § 2). Article VII, Section 1 provides one such express exclusion:

> An employee will be considered to be probationary during his first ninety (90) calendar days of continuous employment. During this period, the Company shall have the right, in its sole discretion, to terminate the employee, and any such action shall not be subject to the grievance or arbitration provisions of this Agreement. After the employee has concluded his probationary period, his seniority will be computed as outlined in Section 2 below.

(*Id.*, art. VII, § 1). This provision expresses a clear and unambiguous intent to exclude recent hires from the grievance and arbitration provisions.

Interpreting the CBA according to ordinary principles of contract law, Article VII, Section 6 does not indicate an express intent to exclude retired employees from arbitration. That section provides that "[a]n employee shall lose his seniority and cease to be an employee" for any of eight specified reasons. (*Id.*, art. VII, § 6). Unlike Section 1, Section 6 of Article VII does not include a clear reference to the grievance or arbitration provisions. As an ordinary contract, Section 6 does not present issues that are "expressly excluded from the Grievance Procedures or Arbitration in this Agreement." (*Id.*, art. III, § 2). Moreover, Section 6 cannot overcome the strong presumption of arbitrability imposed by federal labor law policy.

Context also strongly suggests that the occurrences listed in Section 6 were entirely unrelated to arbitrability of a grievance. Article VII is titled "Seniority" and sets

forth provisions for the calculation and accumulation of seniority, which is generally used for layoffs and recalls. Section 5 provides that "[i]n all cases of layoff or recall, seniority will govern by Seniority Group, provided that the Company determines that the senior employee is capable of performing the work." (CBA, art. VII, § 5). Section 6 then provides "[a]n employee shall lose his seniority and cease to be an employee for any of the following reasons:

A. He quits.
B. He is discharged.
C. He retires.
D. He has been laid off for a period of thirty-six (36) calendar months.
E. He fails to notify the Company of intent to return to work within five (5) workdays after issuance of notice to return to work is sent by certified mail to his last address of record with the Company. It is the employee's obligation to notify the Company of any change of address.
F. He fails to return to work within fourteen (14) calendar days of the date of the notice provided in E above, unless he is excused by the Company.
G. He fails to report to work at the expiration of a leave of absence or violates the conditions of his leave of absence.
H. His leave of absence exceeds two (2) years.

(*Id.*, art VII, § 6). Although the first three reasons are nondescript, the remaining five reasons involve matters that are particularly relevant to determining whether an employee should lose seniority and be excluded from the list of those recalled to work. In particular, Section 6(E) and 6(F) make specific reference to the procedures governing recall.

Interpreting Section 6 in the manner advanced by the Company would produce an inherent contradiction in the CBA. Section 6 begins with an introductory clause and uses a colon to introduce the list of eight specified reasons. (CBA art VII, § 6). This expresses the parties' intent that the occurrence of any of the eight listed reasons would

produce the same result, namely, that the "employee shall lose his seniority and cease to be an employee." (*Id.*) The Company argues that the Grievance is not arbitrable because Section 6(C) provides that Keith lost his seniority and ceased to be an employee when he retired. Under this construction, Section 6(B) would provide that any grievance filed by a discharged employee is not arbitrable because that employee also lost his seniority and ceased to be an employee. The Company does not dispute that it would have been obligated to arbitrate the Grievance if Keith had not retired. In fact, the CBA establishes special rules for discharged employee in the initial grievance procedure (*Id.*, art. II, § 5), and the arbitration provision expressly references the arbitrator's authority with respect to discharged employees. (*Id.*, art III, § 2). Additionally, it is undisputed that the Company has arbitrated grievances with three discharged employees. (Doc. 11, Ex. A at ¶ 7). The Court acknowledges that there is a distinction between an employee making the unilateral choice to retire and the Company discharging an employee, but the Company did not advance that contention in support of its proffered interpretation.

Accordingly, the Company has not overcome the strong presumption in favor of arbitrability by identifying an "express provision excluding a particular grievance from arbitration." *Kroger Co.*, 617 F.3d at 905. The Company also has not advanced any forceful evidence of a purpose to exclude the Grievance from arbitration. *Id.* Because the Court must "resolve any doubts in favor of arbitration" and is unable to say "with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute," the Company is not entitled to a declaratory judgment that it has no obligation to arbitrate the Grievance. *Id.* at 904.

Second, the Company argues that the Grievance is not arbitrable because the arbitrator would lack authority to award the remedy the Union seeks. Alternatively, the Company seeks a declaration that it is only obligated to arbitrate the issue of whether Keith is entitled to back pay for the time between his discharge and retirement. The arbitrator "shall confine his consideration to the specific issue or issues expressly raised by the grievance." (CBA, art. III, § 2). The Union's Grievance alleged that the "stated reason for termination '. . . changing or falsifying time on a work order' ignores the fact that Mr. Keith accurately reported the time required to complete his duties, was granted clearance for changes by previous management, and that changing times could [*sic*] and was a part of his employee duties. He performed the work for which he was paid." (Doc. 1, Ex. B).[2] Next, "the Arbitrator's sole task shall be to determine whether the employee engaged in the activity with which he is charged." (CBA art. III, § 2). Finally, "if the Arbitrator determines that the employee did not engage in the activity with which he is charged, the discipline shall be removed and the employee shall be provided net back pay." (*Id.*) The arbitrator could award this remedy without having to "add to, subtract from or alter any of the terms" of the CBA. (*Id.*)

The Company relies on *O-N Minerals v. Int'l Bhd. of Boilermakers*, 563 F. App'x 380 (6th Cir. 2014), for proposition that the Grievance is not arbitrable because the

[2] The Grievance also provided: "We also contend that the punishment Mr. Keith received was overly excessive and violated the Company's own established disciplinary past practice. Mr. Keith's immediate supervisor surely was aware of numerous work order changes and never questioned him or restricted his clearance. Therefore we insist that Mr. Keith be fully reinstated immediately." (Doc. 1, Ex. B). The Union concedes that this demand was not based on a claimed violation of the CBA. (Doc. 11 at 12).

arbitrator would lack authority to award the relief the Union seeks. The parties' arbitration clause in *O-N Minerals*, much like that here, provided that an arbitrator "shall not have jurisdiction or authority to alter in any way the provision of the agreement." *Id.* at 382. One provision of the CBA established employees' hourly wages and future increases, while a separate provision required the company to make contributions to a pension fund based on the number of hours worked by an employee. *Id.* at 381. When the third-party pension trust stopped accepting contributions from the company, the company deposited the employees' pension contributions into an escrow account. *Id.* at 382. The union filed a grievance contending that the company was in breach of the CBA and demanding that the pension contributions be added to the employees' hourly wages. *Id.* at 383. The company filed a declaratory judgment action seeking a ruling that the company had no obligation to arbitrate the grievance, and the union filed a counterclaim to compel arbitration. *Id.*

The court of cppeals affirmed the district court's ruling that the grievance was not subject to arbitration. The parties' CBA expressly provided that the arbitrator "shall not have jurisdiction or authority to alter in any way the provision of the agreement," yet "the only remedy the union seeks would require the arbitrator to alter two separate provisions of the CBA." *O-N Minerals*, 563 F. App'x at 386. Accordingly, the strong presumption in favor of arbitration was overcome and the court of appeals could say "with positive assurance that the language of the arbitration clause is not susceptible to an interpretation that would allow an arbitrator to convert the pension contributions into hourly wages." *Id.*

Here, the Court is also "asked to decide in advance that any remedy the arbitrator could award would not be consistent with his authority under the collective bargaining agreement." *O-N Minerals*, 563 F. App'x at 385. The Grievance challenged the Company's stated reason for Keith's termination. (Doc. 1, Ex. B). The CBA expressly authorizes the arbitrator to "determine whether the employee engaged in the activity with which he is charged." (CBA, art. III, § 2). Additionally, the CBA requires that "an employee grievance must state the material facts on which it is based," but does not require a demand for a remedy. (*Id.*, art. II, § 2). In the grievance provisions specifically applicable to discharged employees, the CBA provides that "[i]n the event that reinstatement is decided upon, the question of compensation for loss of time due to the employee's discharge shall be determined in the same decision." (*Id.*, art. II, § 5). Finally, at the arbitration stage "if the Arbitrator determines that the employee did not engage in the activity with which he is charged, the discipline shall be removed and the employee shall be provided net back pay." (*Id.*, art. III, § 2).

The arbitrator has authority to hear the Grievance and the available remedies are circumscribed by the CBA. The court of appeals has held that when reviewing an arbitration award, "the presumption of authority that attaches to an arbitrator's award applies with equal force to his decision that his award is within the submission." *Bhd. of Locomotive Engineers & Trainmen v. United Transp. Union*, 700 F.3d 891, 902 (6th Cir. 2012) (quoting *Johnston Boiler Co. v. Local Lodge No. 893, Int'l Bhd. of Boiler-makers*, 753 F.2d 40, 43 (6th Cir. 1985)). This policy "protects the judiciary from having to determine, on a case-by-case basis, the precise scope of a submission in the countless

disputes that regularly occur in the course of industrial self-government." *Id.* Here, the Company essentially asks the Court to advise the arbitrator on the limits of his or her authority to fashion an award. However, the parties already provided those limits in the CBA. The Court will not preemptively assume that the arbitrator will misconstrue those bonds. Accordingly, the Company is not entitled to a declaration limiting the scope of arbitration or the potential award.

IV. CONCLUSION

Wherefore, for these reasons, Plaintiff Cincinnati Incorporated's motion for summary judgment (Doc. 9) is **DENIED**. This dispute needs to proceed to arbitration.

Finally, the Court addresses a procedural matter. In the Union's memorandum contra, the Union requests that the Court order the Company to proceed to arbitration. However, as the Company correctly notes in its reply, the Union did not file a counterclaim seeking to compel arbitration. *See O-N Minerals*, 563 F. App'x at 381 ("The Union filed a counterclaim seeking an order to compel arbitration."); *Kroger Co.*, 617 F.3d at 903 (noting that the union "filed a complaint in district court to compel arbitration"). The Court is of the opinion that it need not address this matter at the current time and anticipates that the parties will file a joint dismissal entry within fourteen days of the entry date of this Order. If an agreement is not forthcoming, the Union shall file a motion seeking appropriate relief forthwith, and may seek to recover any additional fees and costs incurred.

IT IS SO ORDERED.

Date: 3/30/2015

s/ Timothy S. Black
Timothy S. Black
United States District Judge