

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2009-CA-001328-MR

UNIT COLLIERIES, INC.

APPELLANT

v.

APPEAL FROM PIKE CIRCUIT COURT  
HONORABLE EDDY COLEMAN, JUDGE  
ACTION NO. 07-CI-01633

FON ROGERS, SUCCESSOR IN TRUST OF  
THE FON ROGERS TRUST NO. 2

APPELLEE

OPINION AND ORDER  
DISMISSING

\*\* \*\* \* \*\* \* \*\* \*

BEFORE: CLAYTON AND COMBS, JUDGES; LAMBERT,<sup>1</sup> SENIOR JUDGE.

COMBS, JUDGE: Unit Collieries, Inc., (Unit) appeals from an order of the Pike Circuit Court enforcing a contract provision in its lease with the Fon Rogers Trust No. 2 (Rogers). Rogers has filed a motion to dismiss the appeal. Upon careful review, we grant Rogers's motion and accordingly dismiss this appeal.

---

<sup>1</sup> Senior Judge Joseph Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Unit mines coal on land that it leases in Pike County from Rogers, and Rogers receives royalties from the coal that is mined. In 2005, a dispute arose between the parties regarding “lost coal,”<sup>2</sup> which is coal that Unit has failed to mine. Rogers seeks compensation for the lost coal.

Paragraph 8(c) of the lease agreement between the parties is a provision specifically addressing lost coal. It directs in pertinent part that:

if there be any dispute as to coal so lost, it will, under the notice provisions and within the time limits prescribed by Paragraph 21 herein, be resolved between the engineers for the respective parties and if they be unable to agree, then the two shall select a third engineer, and the decision of two of the three shall be binding.

The notice provisions and time limits of Paragraph 21 refer to direct formal arbitration procedures for all other types of disputes arising from the lease.

In accordance with Paragraph 8(c), Rogers initiated communications with Unit, requesting that their engineers meet to discuss the lost coal issue. Unit’s engineer did not participate, and Rogers’s engineer determined that lost coal was on the land with a value in excess of one million dollars. In 2007, Rogers filed a complaint in Pike Circuit Court seeking either enforcement of Paragraph 8(c) or an award of the value of the lost coal. Unit countered by asking the court to compel arbitration according to Paragraph 21.

On June 23, 2009, the trial court entered an order requiring Unit and Rogers to submit to the provisions of Paragraph 8(c). Unit then appealed, and Rogers filed a motion to dismiss the appeal.

---

<sup>2</sup> The parties are embroiled in another dispute arising from their contract, which is not before us in this appeal.

Unit argues that the appeal should not be dismissed because the trial court denied its motion to compel arbitration under the provisions of Paragraph 21. We disagree.

An order compelling or denying arbitration is an interlocutory order. *See* Kentucky Rule[s] of Civil Procedure (CR) 54.01. By definition, it lacks finality and cannot be appealed. However, Kentucky Revised Statute[s] (KRS) 417.220 provides narrow exceptions for interlocutory orders that are appealable. One of them is a **denial** of a motion to compel arbitration. KRS 417.220(1)(a). We are persuaded that KRS 417.220(1)(a) is irrelevant to the case before us because the trial court actually **compelled** arbitration, which is not one of the statutory exceptions.

*Arbitration* is defined as “a method of dispute resolution involving one or more neutral third parties who are usually agreed to by the disputing parties and whose decision is binding.” *Black’s Law Dictionary* 100 (7<sup>th</sup> ed. 1999). Paragraph 8(c) of the lease does not explicitly contain the word “arbitration,” but its provisions describe and constitute that very procedure. The engineers are not parties to the litigation, and the parties have agreed that their decision will be binding. In a venerable old case that is directly pertinent to this matter, our Commonwealth’s highest court held more than a century ago as follows:

a stipulation in a contract . . . that the engineer shall be the sole judge of the quality and quantity of the work, and from his decision there shall be no appeal, is binding upon the parties, and **constitutes the engineer the arbitrator** or umpire between them.

*City of Covington v. Limerick*, 40 S.W. 254, 256 (Ky. 1897) (quoting *Herrick v. Belknap's Est.*, 27 Vt. 673 (Vt. 1855)). (Emphasis added).

It is well established that an order to compel arbitration cannot be heard on appeal. *Fayette County Farm Bureau Federation v. Martin*, 758 S.W.2d 713, 714 (Ky. 1988). Therefore, because the trial court has ordered the parties to participate in arbitration, we are obliged to grant Rogers's motion.

Therefore, it is ORDERED that this appeal be, and it is hereby,  
DISMISSED.

/s/ Sara Walter Combs  
SARA WALTER COMBS,

JUDGE  
ENTERED: OCTOBER 22, 2010

ALL CONCUR.

COUNSEL FOR APPELLANT:

John S. Reed  
David J. Hale  
Trevor L. Earl  
Louisville, Kentucky

Randy G. Clark  
Pikeville, Kentucky

BRIEF FOR APPELLEE:

Stephen L. Hogg  
Pikeville, Kentucky