SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: [redacted] J.S.C. Justice PART 44

Port Authority
-v-
Union of Auto

INDEX NO. 451628/12
MOTION DATE 12/19/12
MOTION SEQ. NO. 12

The following papers, numbered 1 to ____, were read on this motion to/for ____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ No(s). ____

Answering Affidavits — Exhibits ____ No(s). ____

Replying Affidavits ____ No(s). ____

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: ____

Mat, J.S.C.

1. CHECK ONE: ..... ☑ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Part 44

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Index No.: 451628/12

Application of
THE PORT AUTHORITY OF NEW YORK AND
NEW JERSEY,

Petitioner,

v.

Decision

THE UNION OF AUTOMOTIVE TECHNICIANS

Respondent.

----------X

HONORABLE JUSTICE Milton A. Tingling

The Port Authority of New York and New Jersey ("Port Authority" or "Petitioner") moves the court by notice of Verified Petition dated October 19, 2012 to vacate an arbitrator's opinion and award on the grounds the arbitrator exceeded the authority granted under the arbitration clause between the parties. The Union of Automotive Technicians ("UOAT" or "Respondent") opposes this motion to vacate and cross-moves to confirm the arbitrator's opinion and award with certain modifications.

The Port Authority and the Union of Automotive Engineers entered into a Memorandum of Agreement ("MOA") in which the parties would arbitrate complaints and or disputes arising under the MOA. This arbitration agreement is subject to Article XXVII of the Grievance Arbitration Procedure (Verified Petition, ¶ 3). The arbitration agreement states: "the arbitrator shall not have the power to add to, subtract from, or modify the provisions of the Memorandum of Agreement and shall confine his decision solely to interpretation and application of the

Memorandum of Agreement. The arbitrator shall confine himself to the precise issue presented for arbitration and shall have no authority to determine any other issue presented to him nor shall he submit observations or declarations of opinion which are not essential in reaching the determination" (*id.* at ¶ 4).

On or about May 8, 2009, the UOAT and Port Authority executed a MOA which was effective from August 23, 2006 to August 22, 2011. Pursuant to Article XLIV of the MOA, Port Authority implemented an E-Z Pass program for employees to use Port Authority facilities (*id.* at ¶ 6). The E-Z Pass program allowed active and retired Port Authority employees to receive free passages on tunnels and free use of parking lots (Memorandum of Agreement, Section XLIV ¶ 2A). On November 18, 2010, the Port Authority Board of Commissioners voted to discontinue the E-Z Pass program for non-represented retirees and retirees, effective January 1, 2011 (Verified Petition, ¶ 8). On January 1, 2011, Port Authority discontinued the E-Z Pass program for all retirees including those formerly in the UOAT bargaining unit (*id.* at ¶ 9).

On January 7, 2011, the UOAT filed a grievance alleging that Port Authority violated the parties' MOA when they "unilaterally acted to eliminate the number of free passages at Port Authority tunnel and bridge facilities and the free use of parking lots at Port Authority airports for bargaining unit employees who upon retirement from Port Authority service are eligible to carry this contractual benefit into retirement under the terms of the negotiated agreement in effect at the time of their retirement" (*id.* at ¶ 10). This matter then proceeded to a hearing on October 31, 2011 before Arbitrator Earl Pfeffer, Esq. The arbitrator issued an Opinion and Award on July 24, 2012 finding that "Port Authority's unilateral decision to discontinue the E-Z Pass program for retirees, effective January 1, 2011 violated Section XLIV of the MOA" (*id.* at ¶ 13).

Consequently, Arbitrator Pfeffer ordered that Port Authority restore the benefits to all retirees, including those who retired under predecessor MOA's (*id.* at ¶ 14).

Pursuant to CPLR 7511(b)(i)(iii): *Vacating or modifying an award*-- an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made. There are three grounds for challenging an arbitrator's determination of the controversy: (1) the arbitrator has exceeded a specifically enumerated limitation on his authority; (2) the decision is totally irrational; or (3) the award violates a strong public policy *Board of Education of the Dover Union Free School Dist. v. Dover-Wingdale Teachers' Ass'n,* 61 N.Y.2d 913 (1984). An arbitrator exceeds his power when he gives a totally irrational construction to the contractual provisions in dispute, and thus makes a new contract for the parties *Riverbay Corp. v. Local 32-E,* 91 A.D.2d 509, 510 [1st Dept. 1982].

In order to better address the issues raised herein, a brief recitation of collective bargaining history is in order.

According to the Bureau of Labor Statistics, collective bargaining is the method whereby representatives of employees (unions) and employers negotiate the conditions of employment, normally resulting in a written contract setting forth the wages, hours, and other conditions to be observed for a stipulated period (e.g., 3 years). The term also applies to union-management relations during the term of the agreement. The collective bargaining movement developed further as part of the legislation evolving through the New Deal. In 1935 Congress passed the National Labor Relations Act ("Act"), the first piece of legislation establishing the basic right of

private sector employees to organize trade unions, engage in collective bargaining agreements and engage in collective actions which include striking, if deemed necessary. The Act made it illegal for employers to discriminate against or terminate employees who have union membership. Under the process of collective bargaining, employers and employees negotiate wages, hours and benefits without relying on litigation. Once the workers' committee and management have agreed on a contract, it is put to a vote by all the workers in the workplace. If the contract is approved, it is in effect for the requisite fixed number of years; when that time period has expired the terms of the contract are then renegotiated by the employees and management. If there is a dispute with the union contract, the matter goes to arbitration.

The Federal Arbitration Act (hereinafter "FAA") was passed in 1925. The Act was enacted to give arbitration the same status as litigation. After World War II, arbitration became substantially important to labor management relations because 25% of the workforce was unionized. Consequently, in 1947, Congress passed the Taft-Hartley Act (Labor Management Relations Act of 1947) to restrict the power and the activities of labor unions. The Taft- Hartley Act imposed limits on the labor unions' right to strike. The Act was amended to include a list of prohibited actions such as jurisdictional strikes, boycotts, political strikes, mass picketing and monetary donations by unions to federal campaigns. The amendments also gave the General Counsel of the National Labor Relations Board discretionary power to seek injunctions against employers or unions who violate the Act. The Taft-Hartley Act retained federal court jurisdiction over collective bargaining agreements. Congress initially passed this section of the Act to empower federal courts to hold unions liable for damages in strikes; however, it later became a catalyst of federal common law which favored arbitration over litigation when

resolving labor disputes. The U.S. Supreme Court upheld arbitration as the primary vehicle when resolving labor issues by limiting the judiciary's role. For example, in *Southland Corp. v. Keating,* 465 U.S. 1, 3 (1984) the court held in part: "since the overwhelming proportion of civil litigation in this country is in the state courts, Congress could not have intended to limit the [Federal] Arbitration Act to disputes subject only to federal court jurisdiction. In creating a substantive rule applicable in state as well as federal courts, Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements." This holding written for the majority by Chief Justice Warren Burger, laid out the intent of Congress that the FAA was enacted as a national policy favoring arbitration.

Since *Southland Corp.*, numerous collective bargaining agreements have proceeded to arbitration in order to solve union- management disputes. Of particular interest to the parties herein, on January 7, 2011 at the offices of the American Arbitration Association in Philadelphia, Pennsylvania, an arbitration hearing was held between the Delaware River Port Authority (DRPA), its subsidiary Port Authority Transit Corporation (PATCO) and three unions: IBT Local 676, FOP Lodge 30 and IUOE Local 542 (hereinafter "the Unions"). DRPA/PATCO is composed of 16 Commissioners, eight appointed by the Governor of New Jersey and eight appointed by the Governor of Pennsylvania. According to statute, two of the appointees from Pennsylvania must be the State Treasurer and the State Auditor.

On July 29, 2008, Governor Chris Christie of New Jersey sent a letter to John H. Estey, Chairperson of the DRPA and to Jeffrey L. Nash, Vice Chair of the DRPA. The letter stated in part: *"As you know, I had previously called for the abolition of DRPA employee car allowances for E-Z Pass and other perks not available to the toll paying private citizens of New Jersey and*

Pennsylvania. I am pleased to see that Governor Rendell supports reform at DRPA as well. We jointly agree that the following reform should be adopted immediately: Eliminate all free fare perks for employees and retirees. Eliminate all car allowances." Governor Edward Rendell of Pennsylvania also sent a letter to John H. Estey and Jeffrey L. Nash supporting Governor Christie's sentiments: *"The continuing controversy surrounding the issuance of free rides and other perks demanded that additional steps must be taken to restore public confidence in the administration of DRPA. I understand that the DRPA's management is supportive of these proposals and I urge you to enact the reforms outlined herein as quickly as possible."*

The "free rides and other perks" referred to by the governors consisted of a past practice and contractual provision that granted retired and active employees 100 free E-Z Pass trips on bridges and up to 10 free freedom card trips on PATCO; as well as 100 freedom card trips on PATCO and up to 10 free E-Z Pass trips on DRPA bridges. These free passages were limited within one hour of the time designated to report to duty and within one hour of the end of the employee's tour of duty. DRPA/PATCO sought to enact the governors' mandates and terminated the unions' aforementioned benefits.

Pursuant to the collective bargaining agreement between the parties, the Unions filed grievances on behalf of their members. DRPA/PATCO states that once the grievances were filed, the Board voted 15 to 1 to reinstate the bridge pass benefits for members of the various Unions. However, Governor Christie exercised his veto authority and the Board was unable to take action to reinstate the bridge passage benefits.

The instant matter went to arbitration because the Unions believed that DRPA/PATCO violated a past practice and contractual provisions previously approved on August 7, 1997. On

September 15, 2008 DRPA/PATCO amended the policy stating that employees who were hired on or after January 1, 2007 *were not* eligible to receive these E-Z Pass benefits annually upon retirement. Those employees who were hired prior to January 1, 2007 *were* eligible to receive the E-Z Pass benefits annually upon retirement.

DRPA/PATCO argued that in these tough economic times the elimination of those combined benefits would add approximately $200,000 to $250,000 in yearly revenue to the DRPA. The unions argued that their members have received an unlimited transportation pass in their Memorandum of Agreements dating back to the 1960's; that it has been customary in this industry to receive these types of benefits; and the collective bargaining agreements mandated arbitration as the exclusive dispute resolution mechanism, not arbitrary actions by DRPA/PATCO or Governor Christie unilaterally amending or in this case terminating a negotiated benefit.

The arbitrator in that matter agreed with the Unions and stated the language in the agreement between the Unions and DRPA/PATCO was clear and unambiguous and rejected the effort by the governors or DRPA/PATCO to unilaterally terminate bargained for benefits under a collective bargaining agreement.

In the case at bar, Petitioner claims Arbitrator Pfeffer exceeded his power by ordering Port Authority to provide all retirees, regardless of when they retired, free tolls and parking until the execution of a new MOA. While there is no dispute that the arbitrator has the authority to craft a remedy as to those who retired under the current contract, there is a dispute as to whether his authority expands to those employees who are not covered by the current MOA. It is Petitioner's argument that Arbitrator Pfeffer exceeded his limited authority under the express

provisions of the parties' MOA and as a result the final and definite award on the subject matter is erroneous. Petitioner is now asking the court to vacate Arbitrator Pfeffer's Opinion and Award, dated July 24, 2012. Respondents oppose the motion to vacate the arbitrator's opinion and award in its entirety. Specifically, Respondents argue that should the court determine the arbitration award encompasses only UOAT members who have retired or subsequently retired under the terms of the August 23, 2006 to August 22, 2011 MOA, then the subject matter of the arbitration constitutes a mandatory subject of negotiations rather than a permissive one.

New York Law recognizes three categories of collective bargaining negotiations: mandatory, permissive and nonnegotiable ("prohibited"). Bargaining is mandatory for a subject "treated by statute" unless the statute "clearly preempts the entire subject matter " or the demand to bargain "diminishes or merely restates the statutory benefits" *Matter of City of Watertown v. State of NY Pub. Empl. Relations Bd.*, 95 N.Y.2d 73, 79 (2000). Absent clear evidence that the Legislature intended otherwise, the presumption is that all terms and conditions of employment are subject to mandatory bargaining. However, if "the Legislature has manifested an intention to commit" a matter "to the discretion of the public employer," negotiation is permissive but not mandatory. Finally, where a statute clearly "forecloses negotiation" of a particular subject, that subject may be deemed a prohibited subject of bargaining. If the subject of a collective bargaining agreement is either mandatory or permissive, then it may properly proceed to arbitration *supra*.

Respondent readily concedes the arbitrator exceeded his statutory and legal authority as it relates to the applicability of the Employment Retirement Income Security Act (hereinafter "ERISA") statute. ERISA is a federal law that sets the minimum standard for pension plans in

the private industry. However, ERISA does not apply to the Port Authority of New York and New Jersey as stated in the closing submission of Petitioner in the arbitration findings: "Notwithstanding the fact that ERISA does not apply to governmental entities, the Port Authority's E-Z Pass program is neither a welfare plan nor a pension plan." Accordingly all issues with ERISA raised in the moving papers are deemed resolved in favor of the Petitioner as ERISA is inapplicable herein.

In seeking to vacate or modify an award on the grounds, parties must demonstrate an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made. CPLR 7511(b)(i)(iii): It is well settled that an arbitration award will not be set aside unless it is against public policy, totally irrational or against or in excess of the arbitrator's powers *West Babylon Union Free School Dist. v. West Babylon Teachers Ass'n,* 237 A.D.2d 615 [2nd Dept. 1997]. Here, Respondents filed a grievance on January 7, 2011 stating that Petitioner violated the Memorandum of Agreement when they "unilaterally acted to eliminate the number of free passages at Port Authority tunnel and bridge facilities and the free use of parking lots at Port Authority airports for bargaining unit employees who upon retirement from Port Authority service are eligible to carry this contractual benefit into retirement under the terms of the negotiated agreement in effect at the time of their retirement" (Verified Petition, ¶ 10). This matter proceeded to arbitration and Arbitrator Pfeffer found "Port Authority's unilateral decision to discontinue the E-Z Pass program for retirees, effective January 1, 2011 violated Section XLIV of the MOA." As a result, these E-Z Pass benefits were restored to all retirees, even those not covered under the current August 23, 2006 to August 22, 2011 MOA (*id.* at ¶¶ 13-14).

Arbitrator Pfeffer lays out his reasoning for restoring the E-Z Pass benefits as follows. The negotiations of future retirement benefits for current employees are mandatorily negotiable, while benefits for former employees who have already retired are permissively negotiable. Future retirement benefits are mandatorily negotiable because of the collective bargaining agreements that take place for a fixed term. However, once permissive terms are negotiated, they may be enforced according to contractual dispute resolution procedures. While reviewing Section XLIV of the MOA, the arbitrator interpreted the contract language as plain and unambiguous. Section XLIV 2.B states: "the E-Z Pass Program is available to eligible active and retired employees." The arbitrator found that, "although an initial reading of the foregoing language might support a finding [that] the Program benefits shall be extended only to employees who retire during the term of the current Agreement, as the Port Authority argues, a careful reading of Section XLIV does not substantiate that interpretation. There simply is no indication in the text of Section XLIV that the drafters of the Agreement drew semantic difference between *retirees* and *retired employees*." Furthermore, the arbitrator goes on to explain his reasoning by stating that a letter was sent on December 20, 2010 from the Human Resources Department to "retirees" explaining the E-Z Pass policy changes in greater detail, which was accompanied by a memorandum addressed to "all retired Port Authority Employees." He then interpreted the terms 'retiree' and 'retired Port Authority employees' to be synonymous. Finally, the arbitrator decided that as a result, the E-Z Pass benefits conferred upon the retirees under Section XLIV was a vested lifetime benefit which could not be taken away or modified unilaterally by the Port Authority. Based on this reasoning, the arbitrator reinstated the E-Z Pass Program benefits for all retirees.

The United States Supreme Court has long determined the role of arbitrators in labor disputes. In *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960), the court held: "an arbitrator is confined to interpretation and application of collective bargaining agreement providing for arbitration of grievances and he does not sit to dispense his own brand of industrial justice, and while he may look for guidance from many sources his award is legitimate only so long as he draws its essence from the collective bargaining agreement." Furthermore, the Supreme Court has also made it clear that if the contract as interpreted by [the arbitrator] violates some explicit public policy, we are obliged to refrain from enforcing it *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757 (*see also; International Broth. of Elec. Workers, Local 97 v. Niagra Mohawk Power Corp.*, 143 F.3d 704 (1998)).

Arbitrator Pfeffer interpreted the terms of MOA to include retirees under the current August 23, 2006 contract as well as predecessor retirees. In his analysis he assessed and examined the language of the MOA. He interpreted the terms "retirees" and "all retired Port Authority Employees" to be synonymous. The term "retirees" in the current contract was only meant to include those who retired as part of the negotiated collective bargaining agreement, rather than all Port Authority employees who had previously retired under other contracts. Likewise in *Hudock v. Village of Endicott,* 28 A.D.3d 923 [3rd Dept. 2006] where the court determined that "the language of the CBA unambiguously provides that for all times subsequent to the retirement of plaintiffs and other officers who retired while the 1996–1999 CBA was in effect, those retirees are only required to pay defendant a contribution of $500 or $200 toward their annual medical insurance in consideration of [defendant's] agreement to continue their health insurance coverage." In *Hudock*, the court found that only those retirees under the 1996-

1999 collective bargaining agreement could negotiate the amount of medical insurance they were entitled to pay in the future *(emphasis added)*. Contrary to Petitioner's argument, the arbitrator did not exceed his authority in interpreting the collective bargaining agreement because he did not rewrite the contract. As the court held in *Eighty Eight Bleecker Co. LLC v. 88 Bleecker Street Owners, Inc.*, 51 A.D.3d 507 [1st Dept. 2008] the [MOA] can be construed the way that the arbitrator construed it and the award will not be set aside even when the arbitrator erred in judgment either upon facts or the law; *see also The Port Authority of New York and New Jersey v. The Port Authority Police Lieutenants Benevolent Association*, 39 Misc.3d 1239(A) [1st Dept. 2013]. Therefore, even though Arbitrator Pfeffer erred in his interpretation of a pertinent fact– which retirees benefits should be reinstated, his entire award should not be vacated.

This court finds that in Arbitrator Pfeffer's analysis of Petitioner's decision to eliminate the number of free passages given to its retired employees, his remedy should be limited to employees who have retired under the current contract. The National Labor Relations Board created definitions and terms to be interpreted in collective bargaining agreements. Among them are terms such as "employee" and "retiree." In *Allied Chemical,* a Supreme Court case where a Company engaged in mid-term negotiations about health care coverage that their retired employees should receive, the Board reasoned that retired employees are employees within the meaning of the statute for the purposes of bargaining about changes in their retirement benefits. The court held that, "retirees' benefits are not a mandatory subject of bargaining, although their own future retirement plans are. Therefore, retirees' benefits do not vitally affect the employment of current employees" *Allied Chemical and Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass,* 404 U.S. 157 (1971). While Arbitrator Pfeffer was within his powers to

interpret the E-Z Pass privileges of those employees under the current contract; he did not have the authority to reinstate benefits to all retirees, including those not covered under the August 23, 2006 contract. Similarly, courts have found that the retiree is entitled to the same or equivalent coverage during his retirement as the coverage in effect at the time he retired *Della Rocco v. City of Schenectady,* 252 A.D.2d 82, 84 [3rd Dept. 1998]. While not addressing the issue of whether or not the alleged benefit is available to unions not presently involved in this action, the Port Authority employees who negotiated the August 23, 2006 contract would be entitled to those E-Z Pass benefits throughout their retirement (*see United Steel, Paper and Forestry, Rubber, Mfg., v. Cookson America, Inc.,* 710 F.3d 470 (2013). In the aforementioned, the court noted the exclusion of retirees from a union's bargaining unit means that an employer need not bargain with retirees on a collective basis). Therefore the E-Z Pass benefits cannot be extended to retirees who did not negotiate them.

A similar arbitration dispute occurred between the DRPA/PATCO and their three Unions, where the E-Z Pass benefits of those Port Authority employees were abruptly terminated. After the Unions filed a grievance, the arbitrator reinstated their E-Z Pass benefits. His reasoning for restoring those benefits is quite similar to Arbitrator Pfeffer's reasoning, with a few distinctions. As was the case here, DRPA/PATCO took unilateral action and removed existing benefits that were part of the collectively negotiated agreements. An employer cannot stray from those obligations under the collectively negotiated agreements midway through their enforcement. The arbitrator reasoned that the language in the Agreement was clear, and held that the DRPA/PATCO's actions of not granting the benefits violated the terms of the Agreement. As a result, the arbitrator restored the E-Z Pass benefits to all employees who negotiated the collective

bargaining agreement. Solidifying the arbitrator's findings in that instance were correspondences and memorandums to the retirees wherein it was crystal clear the befit extended to them and was acknowledged by DRPA/PATCO's written actions. Accordingly, Arbitrator Pfeffer was well within his authority to reinstate the rights of the retired employees covered under the current contract.

As it pertains to those unions not involved in this arbitration, the court will not address the rights of those retirees except to state on a legal basis because those extensive arguments were not made. However, it is duly noted that other arbitrations have addressed the vested lifetime benefits of retirees in predecessor MOA's. As Arbitrator Jack D. Tillem stated in the Matter of the Arbitration, *Local 3, IBEW v. The Port Authority of New York & New Jersey,* "Unless otherwise stipulated, it must be understood that a retirement benefit in a CBA is for the life of the retiree. If you ask someone if they are getting a particular benefit in their retirement and they answer yes, it is assumed it is for life unless they tell you no, it expires when I reach age 75 or some other limitation. The parties of course are free to change retirement benefits for its bargaining unit employees in successor contracts. But they cannot throw past retirees under the bus." While this court's findings in this case are to reinstate the E-Z Pass benefits to those employees covered under the current August 23, 2006 to August 22, 2011 MOA and not all retirees, same is no indication of any future rulings on arbitration confirmation, modifications, vacature decisions.

Accordingly the Petitioner's motion to vacate the arbitrator's opinion and award and the Respondent's cross motion to confirm the arbitrator's opinion and award are granted solely to the extent the arbitrator's award is modified to the extent the E-Z Pass benefits of the employees

[* 16]

covered under the current, August 23, 2006 to August 22, 2011 contract are restored. Furthermore, the benefits of those retirees under prior MOA's are not addressed as said issue is not properly before the court. The arbitrator's determination concerning same is hereby vacated. Settle order on notice.

Dated: July 3, 2013

HON. MILTON A. TINGLING
J.S.C.