[Cite as *Laborer's Internatl. Union of N.A., Local Union No. 860 v. Cuyahoga Cty. Court of Common Pleas, Juvenile Div.*, 2019-Ohio-3190.]

IN THE COURT OF APPEALS OF OHIO
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY

LABORER'S INTERNATIONAL UNION OF NORTH AMERICA, LOCAL UNION NO. 860,

CASE NO. CA-19-108096

PLAINTIFF-APPELLEE,

v.

CUYAHOGA COUNTY COMMON PLEAS COURT, JUVENILE DIVISION,

O P I N I O N

DEFENDANT-APPELLANT.

Appeal from Cuyahoga County Common Pleas Court
Trial Court No. CV18 894745

Judgment Affirmed

Date of Decision: August 8, 2019

APPEARANCES:

Michael C. O'Malley and Matthew D. Greenwell **for Appellant**

Joseph J. Guarino, III **for Appellee**

SHAW, J.

{¶1} Defendant-appellant, Cuyahoga County Court of Common Pleas, Juvenile Division (hereinafter, the "Juvenile Court"), appeals the December 12, 2018 judgment entry issued by the Cuyahoga County Court of Common Pleas[1] granting the complaint and motion to compel arbitration filed by plaintiff-appellee, Laborers' International Union of North America, Local Union No. 860, (hereinafter the "Union"), and overruling the Juvenile Court's motion for summary judgment. For the following reasons, we affirm the trial court's judgment.

Procedural History

{¶2} On March 19, 2018, the Union filed a "Complaint for Order Compelling Arbitration and Selection of Arbitrator in a Reasonable Timely Manner" pursuant to R.C. 2711.03, and a request for a declaratory judgment under R.C. 2721.02. In this complaint, the Union alleged that the Juvenile Court refused to arbitrate a grievance regarding mileage reimbursement under the process set forth in the parties' Collective Bargaining Agreement (hereinafter the "CBA").[2] The Juvenile Court timely filed an Answer arguing that mileage reimbursement policy changes

[1] Due to a conflict with the sitting judges of the Cuyahoga County Common Pleas Court, the case was assigned to a visiting judge by order of the Supreme Court of Ohio.

[2] There are two CBAs at issue both effective from January 1, 2017 to December 31, 2019. One pertains to Probation, Clerks & Transportation and the other pertains to Detention Services. The relevant provisions of the CBAs are identical and are equally applicable to all bargaining unit employees. For ease of discussion, when referencing a specific provision, we will use the numbering and pagination set forth in the CBA pertaining to Detentions Services.

were discretionary management decisions and not subject to arbitration under the CBA. The Juvenile further requested that the Union's complaint be dismissed.

{¶3} On April 20, 2018, the Union filed an amended complaint elaborating upon the mileage reimbursement issue specifically stating that the Juvenile Court had "failed and refused to process a grievance regarding the [Juvenile] Court's past practice of reimbursing employees for mileage at IRS rates, and [failed] to provide the Union with fourteen (14) days advance notice prior to making unilateral changes in policies which affect a mandatory term and condition of employment." (Doc. No. 5 at ¶ 12).

{¶4} The Union also alleged that the Juvenile Court had refused to follow the grievance procedure set forth in the parties' CBA regarding grievances filed by the Union based upon claims that the Juvenile Court suspended and terminated several employees without just cause. In particular, the Union maintained that the CBA required the Juvenile Court to hold "Step 2 grievance meetings" within ten working days of the receipt of the Union's grievances, which the Juvenile Court failed to do. (Id.). The Union requested an order compelling the Juvenile Court to submit these grievances to arbitration.

{¶5} The Juvenile Court subsequently filed an Answer to the Amended Complaint reiterating its position that mileage reimbursement rates are the prerogative of the employer in addition to not being specifically addressed in the CBA. With respect to the Union's claim that it failed to comply with the CBA's

grievance procedure, the Juvenile Court argued that "[t]he collective bargaining agreement requires that the dates for hearings on grievances be scheduled within 10 days and not that hearings be held within 10 days." (Doc. No. 12, ¶ 28, 30).

{¶6} The trial court held a pre-trial hearing and issued the following entry. "Pre-trial held. Parties shall file cross motions on issues involving mileage and scheduling. Telephone conference set for 12/14/18 @ 11:45 p.m. To be initiated by [Plaintiff's] counsel." (Doc. No. 13).

{¶7} On November 1, 2018, the Juvenile Court filed a Motion for Summary Judgment. On the same day, the Union filed a "Brief In Support of Action Compelling Arbitration, and Selection of Arbitrators for Pending Discipline Grievances in a Reasonable Timely Manner," with several accompanying exhibits.

{¶8} On December 12, 2018, the trial court issued a decision on the matter granting the Union's "Complaint for an Order Compelling Arbitration and Selection of Arbitrator in a Reasonable Timely Manner," and overruling the Juvenile Court's Motion for Summary Judgment. Specifically, the trial court determined that both the mileage and meeting scheduling issues involved the parties' disputes regarding the interpretation and application of the CBA which ultimately be should be resolved by an arbitrator. Accordingly, the trial court issued an order compelling the Juvenile Court to submit the Union's grievances to arbitration and ordered the Juvenile Court to select the arbitrator for the pending grievances in a timely manner.

{¶9} The Juvenile Court filed this appeal, asserting the following assignments of error.

ASSIGNMENT OF ERROR NO. 1

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY DENYING APPELLANT'S MOTION FOR SUMMARY JUDGMENT.

ASSIGNMENT OF ERROR NO. 2

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY SUA SPONTE GRANTING SUMMARY JUDGMENT TO APPELLEE, WHEN THE TRIAL COURT FAILED TO GIVE NOTICE TO APPELLANT THAT IT WAS TREATING A BRIEF FILED BY APPELLEE AS A MOTION FOR SUMMARY JUDGMENT AND FAILED TO GIVE APPELLANT ANY OPPORTUNITY TO RESPOND TO THE ERRONEOUS LEGALLY AND FACTUALLY UNSUPPORTED CLAIMS MADE BY APPELLEE.

ASSIGNMENT OF ERROR NO. 3

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY IMPROPERLY CONSIDERING AND RELYING UPON EVIDENCE IN SUPPORT OF SUMMARY JUDGMENT THAT WAS NOT SWORN, CERTIFIED, OR AUTHENTICATED BY AFFIDAVIT IN VIOLATION OF CIV.R. 56(C).

First Assignment of Error

{¶10} In its first assignment of error, the Juvenile Court claims that the trial court erred when it overruled its motion for summary judgment and determined that the mileage and grievance procedure issues raised by the Union in its amended complaint were arbitrable under the parties' CBA.

Standard of Review

{¶11} We apply a *de novo* standard of review to determine whether a controversy is arbitrable under an arbitration provision of a contract. *Pantages v. Becker*, 8th Dist. Cuyahoga No. 106407, 2018-Ohio-3170, ¶ 7. Although there is a presumption in Ohio favoring arbitration, parties cannot be compelled to arbitrate a dispute they have not agreed to submit to arbitration. *Natale v. Frantz Ward, L.L.P.*, 8th Dist. Cuyahoga No. 106299, 2018-Ohio-1412, ¶ 9.

{¶12} The Supreme Court of Ohio consistently has held as follows:

> **"[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which [it] has not agreed so to submit." * * * This axiom recognizes the fact that arbitrators derive their authority to resolve disputes only because the parties have agreed to submit such grievances to arbitration.' " *Council of Smaller Ents. v. Gates, McDonald & Co*. (1998), 80 Ohio St.3d 661, 665, 1998 Ohio 172, 687 N.E.2d 1352, quoting *AT & T Technologies, Inc. v. Communications Workers of Am.* (1986), 475 U.S. 643, 648-649, 106 S.Ct. 1415, 89 L.Ed.2d 648, quoting *United Steel Workers of Am. v. Warrior & Gulf Navigation Co.* (1960), 363 U.S. 574, 582, 80 S.Ct. 1347, 4 L.Ed.2d 1409. Accordingly, when deciding motions to compel arbitration, the proper focus is whether the parties actually agreed to arbitrate the issue, i.e., the scope of the arbitration clause, not the general policies of the arbitration statutes. [*Equal Emp. Opportunity Comm. v. Waffle House* (2002), 534 U.S. 279, 294, 122 S.Ct. 754, 151 L.Ed.2d 755.] It follows that although any ambiguities in the language of a contract containing an arbitration provision should be resolved in favor of arbitration, the courts must not "override the clear intent of the parties, or reach a result inconsistent with the plain text of the contract, simply because the policy favoring arbitration is implicated." *Id*.**

Taylor v. Ernst & Young, L.L.P., 130 Ohio St.3d 411, 2011-Ohio-5262, 958 N.E.2d 1203, ¶ 20.

{¶13} The question of whether a controversy is arbitrable under the provisions of a contract is a question for a court to decide upon examination of the contract. *Gibbons-Grable Co. v. Gilbane Bldg. Co.*, 34 Ohio App.3d 170, 171, 517 N.E.2d 559 (8th Dist.1986). "When confronted with an issue of contract interpretation, the role of the court is to give effect to the intent of the parties to that agreement. The court examines the contract as a whole and presumes that the intent of the parties is reflected in the language used in the agreement." *Martin Marietta Magnesia Specialties, L.L.C. v. PUC of Ohio*, 129 Ohio St.3d 485, 2011-Ohio-4189, 954 N.E.2d 104, ¶ 22, citing *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, ¶ 11. Further, "[i]n interpreting a provision in a written contract, the words used should be read in context and given their usual and ordinary meaning." *Carroll Weir Funeral Home v. Miller*, 2 Ohio St.2d 189, 192, 207 N.E.2d 747 (1965).

Provisions in the CBA

{¶14} At issue in this case are grievances filed by the Union regarding two nonrelated matters. First, whether the Juvenile Court failed to comply with the grievance procedure set forth in the CBA regarding the termination and suspension of employees. Second, whether the Juvenile Court's decision to change its mileage reimbursement policy was an action covered by the CBA, and if so, whether the Juvenile Court failed to adhere to the procedure set forth the in the CBA when it unilaterally implemented that change. We shall address each matter in turn.

1. Scheduling a Step 2 Meeting under the CBA

{¶15} This first matter is related to the disciplinary action taken by the Juvenile Court which resulted in the termination and suspension of multiple employees. The record indicates that the terminations and suspensions arose out of the investigation of an incident involving several employees and a juvenile resident. The following are excerpts from the CBA regarding the grievance procedure.

ARTICLE 9

GRIEVANCE PROCEDURE AND ARBITRATION

Section 1. ***For the purposes of this Agreement, the term "grievance" is a dispute between the Court and Union, or between the Court and an employee, as to the interpretation or application of, or compliance with, an express provision of this Agreement.*** **The resolution of any such grievances shall be affected in the following manner:**

Step 1: The aggrieved employee shall reduce the grievance in writing on a grievance form, sign it, and present it to the Superintendent or designee. The employee must present the grievance within ten (10) working days of the event or circumstances which gave rise to the grievance. Within ten (10) working days of the receipt of the written grievance, a meeting shall be scheduled with the employee, the employee's steward, and the Superintendent or designee. The Superintendent or designee shall reduce the answer in writing and deliver it to the Steward and the employee within ten (10) working days following the meeting.

Step 2: If the grievance is not resolved in Step 1 of this procedure, the employee, or the Steward or Union on his or her behalf, may request a Step 2 meeting by notifying the Court Administrator or designee. ***The parties shall schedule a Step 2 meeting within ten (10) working days of receipt of the written request for a Step 2***

> ***meeting.*** **The Court Administrator or designee shall give answer in writing within ten (10) working days after the meeting.**
>
> **Section 2. If the grievance is not satisfactorily settled at Step 2, the Union may, within thirty (30) calendar days after the receipt of the Step 2 answer, submit the issue to arbitration. The Union may deny approval for the submission of any matter to arbitration on its own motion without consent of the employee(s) involved.**
>
> *******
>
> **Section 4. The time limitations provided for in this Article may be extended by mutual agreement of the Court and the Union. Working Days as used in this Article shall not include Saturdays, Sundays, or paid holidays as provided in this Agreement. A grievance not timely presented for disposition at any step of the grievance procedure shall be considered dropped and resolved on the basis of the last answer given by the Court. The Court's failure to provide a timely answer under Step 1 of this grievance procedure shall result in the grievance being automatically advanced to Step 2. Any disposition of a grievance between the Court and the Union shall be final, conclusive, and binding on all employees, the Court, and the Union. * * ***
>
> **Section 5. A grievance that affects more than one (1) employee and that arises from the same event or set of facts may be presented by the Union. The Union may initially present such grievance at Step 2 of the grievance procedure within ten (10) working days after the Union had knowledge of the event, but no later than thirty (30) calendar days after the occurrence of the event upon which the grievance is founded.**
>
> **Section 6. When an employee receives a suspension or discharge, a grievance must be filed within ten (10) working days of receipt of said discipline. *Suspensions and Terminations shall be filed at Step 2 of the Grievance Procedure*. * * ***

(CBA, Article 9) (emphasis added).

{¶16} It is undisputed by the parties that the CBA requires disciplinary actions taken by the Juvenile Court involving the termination and suspension of employees to be filed at Step 2 of the grievance procedure. It is also not contested that the Union filed the grievances on behalf of the employees involved in the underlying incident and requested the Step 2 meetings within the appropriate timeframe. The gravamen of the Union's complaint is that the Juvenile Court failed to "schedule a Step 2 meeting within ten (10) working days of receipt of the written request for a Step 2 meeting." (CBA, Art. 9, Sec. 1). According to the Union, the grievance procedure in Article 9 directs the Juvenile Court to "schedule—" i.e., conduct the Step 2 meeting within ten working days of its receipt for a request for the meeting.

{¶17} For its part, the Juvenile Court maintains that it "scheduled" the Step 2 meetings as directed by Article 9 by arranging, within ten working days from when the Union's request was made, for the meetings to be held on a future date. The Juvenile Court argues that the "plain language" of the CBA only requires that the meetings be scheduled—i.e., placed on the calendar within ten days, not that the meetings be held within that time period. (Appt. Br. at 8). The Juvenile Court further asserts it would be impossible to conduct the Step 2 meetings within ten working days "due to the volume of materials which included 400 hours of videotape and multiple records." (Doc. No. 14 at 2). Thus, the Juvenile Court insists that it met its obligations under the CBA by placing the meetings on the calendar

within the ten-day timeframe. To the contrary, the Union claims that a timely resolution of these grievances is the purpose of the ten-day rule. As such, the Union contends that merely placing the Step 2 meetings on the calendar within the ten days but not conducting the meetings until a later date defeats the timeliness component imbedded in the parties' agreement.

{¶18} In resolving the matter, the trial court determined that:

> **Reading Article 9 in its entirety, it is clear the parties bargained for timely resolution of grievances, and in some instances, where the time frames are not complied with a grievance may be considered dropped and resolved. Since this is a dispute about the interpretation of, or compliance with an express provision of the CBA, it is subject to arbitration.**

(Doc. No. 16 at 5).

Discussion

{¶19} On appeal, the Juvenile Court challenges the trial court's decision on the ground that the Union never filed a specific grievance regarding the interpretation of the term "schedule" in the Step 2 grievance provisions under Article 9. Therefore, the Juvenile Court claims that the issue was not properly before the trial court and it cannot be compelled to arbitrate the issue. In other words, the Juvenile Court asserts that the Union sought to improperly bypass the grievance process in the CBA by filing a complaint for declaratory judgment and seeking to compel arbitration, instead of following the procedure set forth in the

CBA which requires a party to file a grievance concerning an interpretation of an express provision in the CBA.

{¶20} At the outset, we find the Juvenile Court's argument with respect to the Union's alleged failure to file a separate grievance regarding the meaning of the term "schedule" in Article 9 not persuasive. Here, the record reveals that the parties' dispute over the Juvenile Court's compliance with the grievance procedure hinged upon the parties' differing interpretations of the term "schedule'" and formed the basis of the allegations contained in the Union's Amended Complaint. Notably, the Juvenile Court did not raise its allegation that the Union failed to comply with the grievance procedure by not filing a separate grievance regarding the interpretation of the disputed contract term to the trial court. Nevertheless, it is apparent from the record that both the parties and the trial court were fully apprised of the nature of the parties' disagreement regarding the meaning of "schedule" and the parties were afforded a fair opportunity to argue their respective positions to the trial court. Accordingly, we find no compelling reason to reverse the trial court's decision on this basis.

{¶21} Turning now to the application of the arbitration clause. It is clear that the parties agreed to resolve disputes regarding "the interpretation or application of, or compliance with an express provision of the [CBA]" through Article 9, which sets forth a grievance procedure that culminates in arbitration in the event that the parties are unable to resolve the dispute through the grievance procedure. *See*

(CBA, Article 9 Sec. 1). Therefore, we find that the specific language of the contract clearly demonstrates the parties' intent to resolve a dispute such as this one through arbitration. For these reasons, we conclude that the trial court did not err in ordering the parties to submit the Step 2 meeting scheduling issue to arbitration.

2. Mileage Reimbursement

{¶22} The second issue raised in the Union's complaint involves the Juvenile Court's decision to implement a change in its mileage reimbursement policy. The record reflects that in January 2018 the Juvenile Court modified its rate of mileage reimbursement to employees who used their own vehicles for employment purposes. Effective January 1, 2018, the Juvenile Court no longer reimbursed its employees at the IRS rate of $0.545 per mile, but instead implemented a policy of issuing reimbursement at the Cuyahoga County rate of $0.445 per mile. The Union maintains that the CBA prohibits the Juvenile Court from unilaterally changing its mileage policy. The Juvenile Court counters that there is no express provision in the CBA specifically discussing mileage reimbursement to employees, therefore the decision to change its policy on mileage reimbursement is left to the discretion of the Juvenile Court, not subject to any express provisions in the CBA, and therefore not arbitrable.

{¶23} The parties rely on the following provisions in the CBA to support their positions on the mileage reimbursement issue:

ARTICLE 5

MANAGEMENT RIGHTS

Section 1. Pursuant to ORC Chapters 2151 et. seq. and 2153 et. seq., the Court is the sole body of authority vested with the right to manage operations of the Court. Consequently, the Court shall have the right to take any action it considers necessary and proper to effectuate any management policy, expressed or implied, except as expressly limited under this Agreement. Nothing in this Article shall be construed to restrict or limit any management authority. *The Court is not required to bargain on subjects reserved to the management and direction of this governmental unit, except as it affects wages, hours, and conditions of employment as noted in this Agreement*. Unless otherwise modified by this Agreement, the parties shall be subject to all rights, protections, and obligations of the Court's Personnel Policies and Procedures.

Section 2. Except as limited under this Agreement, the management rights include, but are not limited to, the right to * * * promulgate and enforce reasonable work rules (the Union has the right to challenge the reasonableness of the work rules), Court orders, policies, procedures and practices * * * and to do all things appropriate and incidental to any of its rights, powers prerogatives, responsibilities, and authority, and in all respects to carry out the ordinary and customary functions of the Court in accordance with the provisions of this Agreement, except as modified or restricted by the terms of this Agreement. * * *

Section 3. Supervisors, other non-bargaining unit employees, and independent contractors shall not perform work customarily performed by employees within the bargaining unit. Notwithstanding, supervisors shall be able to instruct employees in the bargaining unit and, in addition, may replace bargaining unit employees as a result of an emergency, not to exceed 48 hours.

In addition, unless otherwise restricted by an express term of this Agreement, all rights are exclusively reserved by the Court.

Section 4. Any of the rights, powers, authority, and functions the Court had prior to the negotiation of this Agreement are retained by the Court except as expressly abridged by a specific provision

of this Agreement. The Court's not exercising rights, powers, authority, and functions reserved to it, or its exercising them in a particular way, shall not be deemed a waiver or [sic] said rights, powers, authority, and functions or its right to exercise them in some other way not in conflict with a specific provision of this Agreement.

ARTICLE 23

COURT POLICIES AND PROCEDURES

Section 1. The policies and procedures contained in the Court's Policies and Procedure Manual shall be applicable to all bargaining unit employees. However, where the policies conflict with any Article in this Agreement, this Agreement shall supersede.

*** * ***

Section 4. Employee responsibility is as follows:

*** * ***

> **(C) All employees required to use a motor vehicle in the course of employment shall maintain the appropriate State of Ohio motor vehicle license and shall comply with all appropriate rules and regulations of the Bureau of Motor Vehicles regarding the same. The Court shall have the right to verify that the employee is maintaining a valid driver's license.**

*** * ***

Section 5. In the event the Court determines modifications of the current applicable policies and procedures are necessary, the Court will notify the Union as soon as possible prior to implementation. ***To the extent any modification affects a mandatory term or condition of employment, the Court shall not implement any modification with respect to bargaining unit employees without first providing the Union fourteen (14) days advance notice.*** *** * ***

(CBA, Articles 5, 23) (emphasis).

{¶24} In contrast to the Juvenile Court's position that because no provision of the CBA expressly discusses mileage reimbursement the issue is non-grievable, the Union maintains that the matter can reasonably be interpreted to "affect wages, hours, and conditions of employment," which the Union claims the Juvenile Court cannot modify unilaterally without negotiation with the Union. *See* CBA Article 5, Section 1 (stating "[t]he Court is not required to bargain on subjects reserved to the management and direction of this governmental unit, except as it affects wages, hours, and conditions of employment as noted in this Agreement").

{¶25} The Union also argues that mileage reimbursement could also reasonably be construed as "a mandatory term or condition of employment," in which case the Juvenile Court is required to give notice before modifying its policy. *See* Article 23, Section 5 (stating "[t]o the extent any modification affects a mandatory term or condition of employment, the Court shall not implement any modification with respect to bargaining unit employees without first providing the Union fourteen (14) days advance notice"). This notwithstanding, Union argues that the inquiry of whether the Juvenile Court's modification of its mileage reimbursement implicates an express provision of the CBA is an issue the parties agreed to settle through the grievance procedure in the CBA. *See* Article 9, Section 1 (stating "[f]or the purposes of this Agreement, the term 'grievance' is a dispute

between the Court and Union, or between the Court and an employee, as to the interpretation or application of, or compliance with an express provision of this Agreement").

{¶26} In the alternative, the Union claims that if no express provision of the CBA applies to this dispute, the Juvenile Court's reimbursement of mileage at the IRS rate is a "past practice" that survived and was incorporated into the CBA and therefore is arbitrable.[3] *See Assn. of Cleveland Fire Fighters, Local 93 of the Intl. Assn. of Fire Fighters v. Cleveland*, 99 Ohio St.3d 476, 2003-Ohio-4278, 793 N.E.2d 484, ¶ 16, 19 (recognizing that past practice may be binding on parties to a CBA in certain circumstances, even when the practice is not set forth in the CBA); *see also, Bonnell/Tredegar Industries, Inc. v. Natl. Labor Relations Bd.*, 46 F.3d 339, 344 (C.A.4, 1995) ("An employer's established past practice can become an implied term of a collective bargaining agreement.")

{¶27} Specifically, the Union directs our attention to the current version of the CBA's Integration Clause contained in Article 36 which states:

ARTICLE 36

FINAL RESOLUTION

[3] "Past practice refers to 'a prior course of conduct which is consistently made in response to a recurring situation and which the parties regard as the correct and required response under the circumstances.' Past practice can be used to interpret ambiguous contract language and to enforce general contract language and can even become an implied contract term." Estes & Love, *The Ubiquitous Yet Illusive "Merger" Clause in Labor Agreements: Semantics, Applications, and Effect on Past Practice*, 87 Ky. L.J. 1, 19 (1999) (internal citations omitted).

> **This Agreement constitutes the entire Agreement between the parties, and no oral statement shall add to or supersede any of its provisions. Any changes in this Agreement must be mutually agreed upon by the parties and must be in writing.**

(CBA, Article 36).

{¶28} The Union attached a prior version of the parties' CBA to its Brief in support of its complaint, in which the Integration Clause stated as follows:

[FORMER] ARTICLE 36

FINAL RESOLUTION

> **This Agreement constitutes the entire Agreement between the parties, and no oral statement shall add to or supersede any of its provisions. Accordingly, there are no oral or written past practices. Any changes in this Agreement must be mutually agreed upon by the parties and must be in writing.**

(CBA, Article 36, eff. 2013-2015).

{¶29} The Union asserts that the apparent deletion of the phrase "[a]ccordingly, there are no oral or written past practices" in the current CBA implies that past practices survive and are incorporated into the current CBA.

{¶30} In resolving the mileage reimbursement issue, the trial court determined that:

> **The Court finds that matters involving the disputes about the interpretation and application of these provisions of the CBA are defined as grievances under the CBA and should be resolved by an arbitrator. The Court simply cannot say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers this asserted dispute. It is well-settled that any doubt should be construed in favor of arbitration.**

(Doc. No. 16 at 4).

Discussion

{¶31} On appeal, the Juvenile Court maintains that the trial court erred because the issue of employee mileage reimbursement does not involve an "express provision" in the CBA. In essence, the parties are disputing the scope of the arbitration clause contained in Article 9. Specifically, whether any of the express provisions of the CBA implicate the mileage reimbursement issue.

{¶32} Although a party cannot be required to arbitrate a dispute that the party has not agreed to submit to arbitration, in light of Ohio's "strong public policy" in favor of arbitration, an arbitration provision should not be denied effect " '*unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute*.' " *Council of Smaller Ents. v. Gates*, McDonald & Co., 80 Ohio St.3d 661, 665-666, 669, 687 N.E.2d 1352 (1998), quoting *AT & T Technologies, Inc. v. Communications Workers of Am.*, 475 U.S. 643, 650, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986)(emphasis added).

{¶33} In other words, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration [.]" *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983); *see also Gaffney v. Powell*, 107 Ohio App.3d 315, 320, 668 N.E.2d 951 (1995) (recognizing that "[a]mbiguities as to the scope of the arbitration clause itself should be resolved in favor of arbitration"); *McManus v. Eicher*, 2d Dist. Greene No.2003-

CA-30, 2003-Ohio-6669, ¶ 11, citing *Artex Oil Co. v. Energy Sys. Management of Ohio*, 12 Dist. Noble No. 292, 2002-Ohio-5244 (noting that "an arbitration clause should be enforced unless the court is firmly convinced that it is inapplicable to the dispute in question").

{¶34} Here, the record before us does not conclusively dispel the Union's contention that the parties intended to categorize employee mileage reimbursement as a mandatory term or condition of employment under Article 5 and 23 of the CBA. As demonstrated from the CBA excerpts above, the broad management rights retained by the Juvenile Court to modify or implement policy and procedures are expressly limited to the extent that they affect or involve a mandatory term or condition of employment. It is not clear from the language of the contract whether an employee's use of his or her own vehicle for employment purposes for which he or she can later seek reimbursement is in fact a mandatory term or condition of employment. Thus, we cannot say we are firmly convinced that CBA is inapplicable to the mileage reimbursement dispute at issue.

{¶35} However, we note that the record is devoid of any evidence supporting the Union's assertion that a binding past practice of mileage reimbursement by the Juvenile Court at the IRS rate would compel this matter to be submitted to arbitration. In order to be binding on parties to a collective bargaining agreement, a past practice must be (1) unequivocal, (2) clearly enunciated, and (3) followed for a reasonable period of time as a fixed and established practice accepted by both

parties. *Assn. of Cleveland Fire Fighters, Local 93 of the Internatl. Assn. of Fire Fighters v. Cleveland*, 2003-Ohio-4278, ¶ 16, 99 Ohio St. 3d 476, 480, 793 N.E.2d 484, 487. There is no credible evidence in the record supporting the claim that the Juvenile Court's former mileage reimbursement policy satisfies this criteria. Therefore, we find this argument regarding past practice to have no merit at this stage in the proceedings.

{¶36} Based on the specific language of the CBA noted above, we simply cannot conclude with positive assurance that the arbitration clause is not susceptible of interpretation that covers the parties' dispute over the mileage reimbursement issue under Articles 5 and 23. Moreover, in recognition that the long standing principle that ambiguities as to the scope of the arbitration clause itself should be resolved in favor of arbitration, in addition to the specific provisions of the parties' agreement, we conclude that the trial court did not err in ordering the parties to submit the mileage reimbursement grievance to arbitration. For the aforementioned reasons, the first assignment of error is overruled.

Second and Third Assignments of Error

{¶37} In these assignments of error, the Juvenile Court claims that the trial court *sua sponte* "converted" the Union's Brief submitted in support of its complaint into a motion for summary judgment and improperly granted summary judgment in the Union's favor. Specifically, the Juvenile Court argues that because the Union filed a Brief rather than a motion, the Juvenile Court was never given any notice

that the trial court was going to treat the Union's brief as a motion for summary judgment and therefore was deprived of the opportunity to respond. The Juvenile Court also contends that in rendering its decision the trial court improperly relied upon exhibits attached to the Union's Brief, which it claims did not comport with Civ.R. 56(C) standards.

{¶38} At the outset, we note that nowhere in the trial court's decision does it appear that the Union's Brief was "converted" to a motion for summary judgment as the Juvenile Court contends. Rather, the trial court specifically stated that "the Union's Complaint and Motion to Compel is GRANTED." (Doc. No. 16 at 5). Moreover, the record reveals that the Juvenile Court did not take exception to the form of the Union's Brief during the trial court proceedings or otherwise attempt file a response to the Union's Brief. To the contrary, the record indicates that neither party filed a response to other's Motion or Brief.

{¶39} Further, to the extent the Juvenile Court contends that the trial court improperly relied upon the exhibits attached to the Union's Brief, we simply find no support for this argument on appeal. Even if the trial court improperly considered these exhibits, our resolution of the assignments of error would be the same given our aforementioned conclusions after conducting our *de novo* review of the plain language of the CBA, our specific disavowal of the Union's past practice argument which these exhibits appear to support, and the general principles of arbitration jurisprudence. Accordingly, we conclude that the trial court did not err in ordering

the relief sought by the Union in its complaint and we overrule the second and third assignments of error.

{¶40} Based on the foregoing discussion, we overrule the Juvenile Court's assignments of error and the judgment is affirmed.

Judgment Affirmed

ZIMMERMAN, P.J. and PRESTON, J., concur.

/jlr

Judges William R. Zimmerman, Stephen R. Shaw and Vernon L. Preston from the Third District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.