

**UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MAINE**

Blethen Maine Newspapers, Inc., d/b/a)	
Portland Press Herald)	
)	
)	Civil Action No. 2:08-cv-00197-GZS
Plaintiff,)	
)	
v.)	
)	
)	
Portland Newspaper Guild, Local 31128)	
)	
Defendant.)	
_____)	

**DEFENDANT’S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM WITH
INCORPORATED MEMORANDUM OF LAW**

COMES NOW, Defendant, Portland Newspaper Guild, Local 31128, to move the Court, pursuant to Fed.R.Civ.P. 12(b)(6), to dismiss Plaintiff’s claims for declaratory relief and to compel arbitration.

In its Complaint, Plaintiff asks the Court to interpret the behavior of Defendant in the processing of a grievance and to conclude that, by such behavior, Defendant has “waived” its right to insist, or should be “estopped” from asserting its right to insist, that Plaintiff arbitrate the underlying grievance. Plaintiff then asks the Court (in lieu of an arbitrator as the parties have agreed) to interpret the parties’ contractual “Duration and Renewal” clause as a means to resolve the parties’ disagreement regarding the clause’s meaning. The requests come in the form of a declaratory judgment action, despite the existence of a mutually obligatory arbitration clause which both parties agree covers the underlying substantive dispute.

Longstanding Supreme Court law dictates, however, that federal courts may not resolve

substantive labor management disputes that are arbitrable pursuant to a duly adopted collective bargaining agreement. Nor can federal courts resolve “procedural” matters, such as allegations of “waiver” or “estoppel,” which grow out of an underlying substantive dispute. This is particularly true when parties agree to an arbitration clause, which, like the parties’ herein, is “broad.”¹ Since this Court cannot grant the declaratory relief Plaintiff seeks, it must grant the Defendant’s 12(b)(6) motion to dismiss the declaratory judgment claim.

Simultaneous with this motion to dismiss, Defendant has moved the Court to strike those portions of Plaintiff’s Complaint which falsely assert that the Collective Bargaining Agreement requires “expedited” consideration of Plaintiff’s grievance. Without the allegation that Defendant has failed to expedite the grievance process, the Complaint fails to allege facts upon which the Court can grant the declaratory or injunctive relief Plaintiff seeks. Thus, the Court should grant Defendant’s 12(b)(6) motion and dismiss Plaintiff’s Complaint in its entirety.²

I. EVEN ASSUMING ALL PLAINTIFF’S ALLEGATIONS TO BE TRUE, THE DECLARATORY JUDGMENT ACTION FAILS TO STATE A CLAIM UPON WHICH THE COURT CAN GRANT RELIEF AS THE COURT ONLY HAS THE AUTHORITY TO ORDER DEFENDANT TO ARBITRATE.

Plaintiff requests that this Court enter a declaratory ruling on the substantive merits of the parties’ disagreement regarding the proper interpretation of the “Duration and Renewal” clause. Complaint, (“Cmpl.”), ¶ 34, 50 (“This suit is ... for the purpose of determining ... (2) whether the 2007 Agreement imposes any obligation on [Plaintiff] to insist that a purchaser of its assets

¹ The clause is quoted in Paragraph 38 of the Complaint, and at n. 3 below.

² Defendant wishes to underscore that it will arbitrate the “Duration and Renewal” clause dispute - retaining its right to challenge the matter’s arbitrability before an arbitrator - even if the Court dismisses the action to compel arbitration.

assume the obligations of the 2007 Agreement”).³ The request for a declaratory order fails to state a claim upon which this Court can grant relief because, even assuming all Plaintiff’s factual allegations are true, Conley v. Gibson, 355 U.S. 41, 45-48, 78 S.Ct. 99 (1957), the Court can only relieve Plaintiff’s alleged harm by ordering Defendant to arbitrate. Thus, the Court must dismiss the claim for declaratory relief.

Federal labor policy strongly favors the arbitration of labor disputes. Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 582-583, 80 S.Ct.1343 (1960). Thus, where a CBA contains an arbitration clause, a presumption of arbitrability adheres. AT&T Technologies v. CWA, 475 U.S. 643, 650, 106 S.Ct. 1415 (1986). It is not the province of courts to evaluate a grievance’s merits, AT&T, supra, 475 U.S. at 649; the court’s narrow function is to decide if “the party seeking arbitration is making a claim which on its face is governed by the contract.” Steelworkers v. American Mfg.Co., 363 U.S. 564, 568, 80 S.Ct. 1343(1960).

Thus, federal courts cannot resolve substantive contractual disputes that are arbitrable pursuant to a duly adopted collective bargaining agreement. Vaca v. Sipes, 386 U.S. 171, 184, 87 S.Ct. 903, 914, 171 L.Ed.2d 842 (1967) (“Since the ... claim is based upon breach of the collective bargaining agreement, [grievant] is bound by the terms of that agreement which govern the manner in which contractual rights may be enforced”); Hayes v. New England Millwork Distributors, 602 F.2d 15, 18 (1st Cir. 1979). Indeed, “judicial review under [LMRA] Section 301 ... is available to resolve disputes under collective bargaining agreements only ‘in

³ The “Duration and Renewal” clause reads:

This Agreement shall begin on the first day of June 2007, and shall expire on the 31st day May 2011, and shall inure to the benefit of and be binding upon the successors and assigns of the Publisher. Cmpl., ¶34.

Defendant acknowledges that the parties’ interpretations of this clause’s meaning are distinct; i.e., the parties disagree over the proper interpretation of the “Duration and Renewal” clause.

the absence of an agreement for arbitration or some other form of final resolution of [the] dispute.’ Local 791, UFCW v. Shaw’s Supermarkets, 507 F.3d 43, 46-47(1st Cir. 2007) [emphasis added]. Therefore, where a party refuses to arbitrate substantive contractual disputes, a federal court may only compel the recalcitrant party to arbitrate.

Plaintiff alleges that Defendant has “refused to cooperate in the processing of [a] grievance” concerning the parties’ differing interpretations of the “Duration and Renewal” clause. Complaint, ¶ 30, 34. Plaintiff further contends that the parties’ “disagreement over th[is] Duration and Renewal clause” is subject to the CBA’s grievance-arbitration machinery. Cmpl., ¶ 37, 52. Since the parties’ dispute is, as Plaintiff contends,⁴ arbitrable, this Court only has the power to order Defendant to arbitrate the dispute. Thus, the Court lacks authority to grant the declaratory relief Plaintiff seeks and must dismiss this claim.

In addition, Plaintiff is requesting that the Court, rather than an arbitrator, evaluate the merits of its grievance. Indeed, consideration of the Plaintiff’s request for declaratory relief requires the Court to not only discern whether Plaintiff is “making a claim which on its face is governed by the contract,” Steelworkers, 363 U.S. at 568, but also to render a ruling as to whether the “2007 Agreement imposes [an] obligation on [Plaintiff] to insist that a purchaser of its assets assume the obligations of the [collective bargaining agreement].” Cmpl., ¶ 51. This Court plainly cannot accept Plaintiff’s misguided invitation to interpret the parties’ CBA when the underlying subject matter is arbitrable. AT&T, 475 U.S. at 649.

Nor can Plaintiff circumvent the restriction on a federal court’s authority to decide a

⁴ Defendant does not question that the “Duration and Renewal” clause is subject to the parties’ grievance arbitration machinery. Cmpl., Attachment D (“When the Company provides the contractually-obligated grievance in this regard, the Guild will process the grievance under the required agreed upon timeframes of the Collective Bargaining Agreement”). Indeed, Defendant scheduled and held a grievance meeting on the dispute on June 12, 2008. Cmpl., ¶ 48 Attachment F.

substantively arbitrable claim by alleging a procedural “waiver” of the arbitration process by Defendant. The Supreme Court ruled long ago that “once it is determined ... that parties are obligated to submit the subject matter of a dispute to arbitration, ‘procedural’ questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator.” John Wiley & Sons v. Livingston, 376 U.S. 543, 557, 84 S.Ct. 909 (1964). The Court expanded upon this holding in Wiley when it later ruled that “once a court finds that ... the parties are subject to an agreement to arbitrate, and that agreement extends to ‘any difference’ between them, then a claim that particular grievances are barred by laches is an arbitrable question under the agreement.” Int’l Union of Operating Engineers, Local 150 v. Flair Builders, 406 U.S. 487, 491-492, 92 S. Ct. 1710 (1972).

Here, the parties agree that the dispute’s alleged subject matter- “whether the parties’ CBA requires Plaintiff to compel a purchaser to assume the CBA’s obligations” - is arbitrable. Plaintiff, however, raises “procedural” questions, in the form of “estoppel” and “waiver”, as a basis for a Court ruling that Defendant may not “insist that [Plaintiff] exhaust the contractual grievance procedures ... before seeking relief from this Court.” Cmpl., ¶ 50. Plaintiff’s procedural claims grow out of the underlying dispute, See Cmpl., ¶ 41-49, and affect the matter’s final disposition. Such procedural matters, just as the underlying substantive dispute, are left to an arbitrator to decide. Wiley, 376 U.S. at 557.

Any contention that Plaintiff’s “estoppel” and “waiver” claims are “extrinsic” to the arbitral process, and therefore not arbitrable, is erroneous. Operating Engineers, *supra*, 406 U.S. at 490-492. The parties are subject to a grievance arbitration clause, which applies to:

any issues arising out of the application of this Agreement, its interpretation with respect to conditions of employment set forth therein or any alleged failure by either party to abide by the express terms of this Agreement.

Cmpl., ¶ 38 [emphasis added].

The agreement to subject “any issues” to arbitration is virtually indistinguishable from the agreement to arbitrate “any difference,” as in Operating Engineers. It is unquestionably a “broad” arbitration clause. *Id.* See also IBEW, Local 1228 v. Freedom, WLNE-TV, Inc., 760 F.2d 8, 11 (1st Cir. 1985) (finding an arbitration clause covering “all problems arising out of grievances or out of the application or interpretation of this Agreement or the performance of any party to it” to be a “broad” arbitration clause). Estoppel and waiver, like laches, are theories which assert that a party’s prior action, or inaction, preclude it from asserting a legal right. See Phelps v. FEMA, 785 F.2d 13, 16 (1st Cir. 1986) (“Equitable estoppel is a judicially-devised doctrine which precludes a party to a lawsuit, because of some improper conduct on that party’s part, from asserting a claim or a defense, regardless of the substantive validity”); Black’s Law Dictionary, 2nd Pocket Edition (2001) (Waiver is “[t]he voluntary relinquishment or abandonment - express or implied - of a legal right or advantage ...”). Where parties agree to a broad arbitration clause, resolution of such procedural claims, “even if extrinsic to the arbitral process,” are the province of an arbitrator. Operating Engineers, supra., 406 U.S. at 492.⁵

Nevertheless, Defendant expects that Plaintiff may refer to Jones Motor Company v.

⁵ The Supreme Court has observed that the “[t]he presumption of arbitrability is “particularly applicable” when parties agree to a “broad” arbitration clause, and may only be overcome if “it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage”. AT&T Technologies, 475 U.S. at 650 quoting Steelworkers, 363 U.S. at 582-583.

Even absent the Operating Engineers ruling, Plaintiff cannot articulate a reasonable argument whereby it could prove with “positive assurance” that the parties’ broad arbitration clause does not cover the “estoppel” and “waiver” claims. This is especially true where the basis of Plaintiff’s “waiver” and “estoppel” arguments is that Defendant has allegedly failed to comply with the grievance-arbitration machinery contained in Article X - an *express term* of the CBA - and the parties have agreed to arbitrate “*any alleged failure by either party to abide by the express terms of this Agreement.*” Cmpl., ¶38 [emphasis added].

With the Operating Engineers ruling, the Supreme Court has pronounced with finality that

Chauffeurs, Teamsters & Helpers Local Union No. 633, 671 F.2d 38 (1st Cir. 1982) to support the Court's authority to rule on both the "procedural" questions and the underlying substantive dispute. It is true that the Jones court ruled that the Defendant union had waived its right to arbitrate the underlying substantive dispute based on its conduct. Jones, 671 F.2d at 43-44. The First Circuit's decision, however, rested wholly on a premise - the Defendant union's behavior *after* the Plaintiff therein filed its complaint - not present here.

In Jones, Defendant had answered the complaint, admitted jurisdiction, conducted and participated in discovery depositions, as well as a pre-trial conference, submitted summary judgment motions and briefs and conducted an oral argument - *all prior to invoking a right to arbitrate the parties' dispute*. *Id.* at 42. Relying on these peculiar circumstances, the 1st Cir. carefully distinguished the factual premise underlying its finding of waiver from the facts the Supreme Court faced in Operating Engineers stating:

In ... [Operating Engineers.] ... the conduct that allegedly amounted to a waiver or equivalent arbitration bar occurred *before* the court complaint was filed and involved issues well suited to an arbitrator's expertise (such as what facts occurred or whether those facts under the contract's standards, should bar arbitration). In contrast, the conduct allegedly constituting waiver here simply consists of a failure to seek arbitration while acquiescing in court resolution of the dispute. These facts took place after the complaint was filed; and the questions of whether they amount to waiver calls for the expertise of a judge, not an arbitrator. Jones, 671 F.2d at 43 [emphasis added].

Here, every act that Plaintiff presumably contends constitutes a "waiver" or "estoppel" of Defendant's right to arbitrate the parties' substantive dispute occurred "before the court complaint was filed and involve[s] issues well suited to an arbitrator's expertise (such as what facts occurred or whether those facts under the contract's standards, should bar arbitration)." Cmpl., ¶ 13-15, 22-32, 41-49. Under these circumstances, the Jones court recognizes that

Plaintiff cannot articulate such an argument, given the parties' broad arbitration clause.

Operating Engineers requires a Court to defer questions of procedural arbitrability to an arbitrator. Jones, 671 F.2d at 43. Thus, this Court is without authority to grant the relief Plaintiff requests in its declaratory judgment action and should dismiss the claim.

II. PLAINTIFF’S ACTION TO COMPEL ARBITRATION FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED BECAUSE IT FAILS TO ALLEGE DEFENDANT HAS REFUSED TO ARBITRATE THE UNDERLYING SUBSTANTIVE CLAIM.

Plaintiff’s second claim for relief requests that the Court compel Defendant to arbitrate whether the parties’ successorship clause requires Plaintiff to insist that a purchaser of the Plaintiff assume the parties’ CBA. Cmpl., ¶52. In order to withstand a 12(b)(6) motion, Plaintiff’s Complaint must allege Defendant’s *refusal to arbitrate the matter* because such refusal is a “material element” of any claim to compel arbitration. Gooley v. Mobil Oil Corp., 851 F.2d 513, 515 (1st Cir. 1988) (“a plaintiff ... is ... required to set forth factual allegations, either direct or inferential, respecting each material element necessary to sustain recovery under some actionable legal theory”). Assuming the Court grants Defendant’s Motion to Strike, and that Plaintiff is claiming that it has a right to a grievance procedure more “expedited” than that which the parties have specifically agreed to in Article X, Section 3 of the CBA, Plaintiff has failed to allege any facts demonstrating a refusal to arbitrate and this Court must dismiss Plaintiff’s action to compel arbitration. *Id.*

Defendant further notes that Plaintiff’s own Complaint demonstrates Defendant’s willingness, rather than refusal, to arbitrate the “Duration and Renewal” clause matter. Indeed, Defendant agreed that “[w]hen the company provides the contractually-obligated grievance ... the Guild will process the grievance under the required agreed upon timeframes of the [CBA].” Cmpl., Attachment D. Upon Plaintiff’s properly articulating its grievance, Defendant subsequently scheduled a grievance meeting. Cmpl., Attachment F. Thus, the Complaint fails to

allege that Defendant has refused to arbitrate the matter, and fails to assert a claim upon which relief may be granted.⁶

III. CONCLUSION

For all the reasons above, Plaintiff's Complaint fails to state any claim upon which the Court can grant relief. Therefore, the Court should dismiss Plaintiff's claims.

WHEREFORE, Defendant moves the Court to dismiss Plaintiff's claim for declaratory relief, Plaintiff's claim to compel arbitration and Plaintiff's Complaint in its entirety.

Dated this 8th day of July 2008.

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⁶ Plaintiff's declaratory judgment claim is subject to dismissal using the same analysis. There is no basis to grant Plaintiff relief on its claim that Defendant "waived" its right to insist, or is "estopped" from its right to insist, that Plaintiff exhaust the parties' grievance arbitration machinery assuming the Court strikes the allegation that Defendant failed and refused to "expedite" arbitration.

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CERTIFICATE OF SERVICE

I, Jonathan S. R. Beal hereby certify that I served a true and correct copy of Defendant's Motion to Dismiss For Failure to State a Claim with Incorporated Memorandum of Law dated July 8, 2008 on each of the parties via U.S. Mail, postage prepaid, on July 8, 2008:

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All other parties listed on the Notice of Electronic Filing have been served electronically

Dated this 8th day of July 2008

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