IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CONOCOPHILLIPS COMPANY,	:	
Plaintiff,	:	
v.	:	**Civil Action No. 09-cv-03842**
UNITED STEELWORKERS, LOCAL 10-234,	:	
Defendant.	:	

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

Plaintiff ConocoPhillips Company ("ConocoPhillips" or the "Company"), by and through its attorneys, hereby submits its Memorandum of Law in Support of its Motion for Summary Judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

This action arises from an arbitration held on May 7, 2009 between Plaintiff ConocoPhillips and Defendant United Steelworkers, Local 10-234 ("Defendant" or the "Union"). ConocoPhillips is a Delaware corporation with its headquarters located in Houston, Texas. The Company operates the Trainer Refinery located along the Delaware River in Trainer, Pennsylvania. (SMF, ¶ 1).[1] The Union is a labor organization that has been recognized by ConocoPhillips as the exclusive collective bargaining representative for a bargaining unit of non-supervisory employees engaged in refining as conducted by

[1] References to ConocoPhillips' Statement of Undisputed Material Facts, filed concurrently herewith, are cited herein as "SMF, ¶ ___."

ConocoPhillips at the Trainer Refinery. (SMF, ¶ 4). ConocoPhillips and the Union are parties to a Collective Bargaining Agreement ("CBA" or "Agreement"). (SMF, ¶ 5). The arbitration grew out of a grievance in which the Union contended that the two-day suspension of Richard Bishop ("Mr. Bishop" or "Grievant"), a former B Pumper Operator employed by ConocoPhillips at its Trainer Refinery, was "too harsh." (SMF ¶¶ 6, 23). The issue submitted to the Arbitrator for decision was whether the Company had "just cause" to issue the suspension. (SMF, ¶ 26).

A. Mr. Bishop's Employment History

At all times relevant hereto, the Grievant, Richard Bishop, was employed by ConocoPhillips' Trainer Refinery as a B Pumper Operator assigned to Area 6 of the Refinery. (SMF, ¶ 6). Mr. Bishop's date of hire was September 27, 2004. (SMF, ¶ 7). As a new employee, Mr. Bishop underwent a lengthy, six-month training program consisting of fundamental safety training, operations classroom training, and on-the-job training, and which covered specific chemical transfers and line-ups, as well as written procedures. (SMF, ¶ 8). At the completion of this training Mr. Bishop was administered written tests and field tests to determine his proficiency in the job for which he had trained and thereafter received his qualification as an operator on May 12, 2005. (SMF, ¶ 9).

B. Mr. Bishop Improperly Issues Safe Work Permits

On November 9, 2005, Mr. Bishop signed and issued safe work permits for work to be performed on 157 tank. (SMF, ¶ 10). A routine audit of the required permitting revealed a number of deficiencies in the permits issued by Mr. Bishop, thereby necessitating the stoppage of work on 157 tank until the permits were properly and accurately completed. (SMF, ¶ 11). One day later, Business Team Leader Colin Franks

("Mr. Franks") met with Mr. Bishop and issued him a verbal warning for failing to follow proper procedure for issuing the safe work permits. (SMF, ¶ 12).

C. Mr. Bishop Misaligns Transfer Pipes, Causing the Contamination of a Sphere of Highly Flammable Pressurized Propane Gas

On October 26, 2005, the Company received a shipment of butane from the Texas Eastern Pipeline, and Mr. Bishop was directed by his Console Supervisor, Bernie Friel, to line up the butane shipment to 515 sphere. (SMF, ¶ 13). Mr. Bishop, however, opened the wrong valve, which directed the butane transfer to a sphere of highly flammable pressurized propane gas (propane sphere 520) and contaminated the product therein. (SMF, ¶ 14). Mr. Bishop's error resulted in significant economic loss to the refinery and a serious safety threat to Mr. Bishop, refinery personnel, and the community at large. (SMF, ¶ 15). Mr. Franks investigated the sphere contamination incident, and, on January 18, 2006, issued Mr. Bishop a written warning. (SMF, ¶ 16).

D. Mr. Bishop Fails to Follow Required Sampling Procedure

On September 4, 2007, Mr. Bishop again failed to follow procedure when he was directed by his Console Supervisor to sample a tank for certification. (SMF, ¶ 17-20). Specifically, the gauging and sampling procedure that Mr. Bishop was required to follow, titled "Area 5/6 Gauging and Sampling Procedure," mandated that Mr. Bishop take three different samples—one from the upper third of the tank, one from the middle third of the tank, and one from the bottom third of the tank—to obtain a representative sample of the entire tank. (SMF, ¶ 18). To obtain each of these samples, including the sample from the bottom of the tank, Mr. Bishop was required to climb a ladder to the top of the tank, open the gauging hatch, and lower a one-quart bottle attached to gauging tape down into the product. (SMF, ¶ 19). Mr. Bishop, however, obtained each of the samples from a valve

located at the bottom of the tank. (SMF, ¶ 20). On September 18, 2007, Mr. Franks met with Mr. Bishop to discuss the improper sampling incident. At this meeting Mr. Bishop did not deny taking the improper samples. (SMF, ¶ 21). Accordingly, on September 18, 2007, Mr. Bishop was issued a two-day suspension for his failure to follow the proper procedure for obtaining certification samples. (SMF, ¶ 22).

E. Mr. Bishop Grieves His Suspension, and the Matter Is Submitted for Arbitration

On September 21, 2007, the Union filed a grievance alleging simply that Mr. Bishop's two-day suspension was "too harsh." (SMF, ¶ 23). The Company denied the grievance at all levels, and the Union elevated the grievance to arbitration. (SMF, ¶ 24). An arbitration hearing was held on May 7, 2009, before Abitrator Robert E. Light. (SMF, ¶ 25). At the hearing, the parties stipulated that the following issue would be submitted to Arbitrator Light: "Was there just cause for the two (2) day suspension imposed on Richard Bishop? If not, what shall be the remedy?" (SMF, ¶ 26). On June 15, 2009, the parties submitted post-hearing briefs. (SMF, ¶ 27).

F. The Arbitrator's Decision

On or about July 22, 2009, Arbitrator Light issued his Opinion and Award in the arbitration matter. (SMF, ¶ 28). In his Opinion and Award, the Arbitrator specifically found that Mr. Bishop had been suspended for his knowing violation of the required procedures for obtaining certification samples, stating, "the grievant violated the written and required operating procedures for obtaining certification samples from Tank 157 on September 4, 2007" and "[h]e knew what those procedures were and he simply did not follow them, offering no legitimate excuse for not doing so." (SMF, ¶ 29).

Despite these findings, the Arbitrator concluded that the Company did not have just cause for the two-day disciplinary suspension imposed on Mr. Bishop, reduced that suspension to a written warning, and awarded Mr. Bishop two days' pay. (SMF, ¶ 32). Specifically, the Arbitrator concluded that ConocoPhillips was obligated to adhere to a five-part progressive discipline structure created by the Arbitrator himself and consisting of "[1] an oral warning, [2] a written warning, [3] a penalty of some duration [i.e., suspension], [4] perhaps a penalty of longer duration [second suspension] and [5] subsequently, if no improvement is made, then termination." (SMF, ¶ 33).

The parties, however, never agreed to any five-step progressive discipline system. No five-step progressive discipline procedure is reflected in any writing or agreement of the parties, and the CBA includes no reference whatsoever to "progressive discipline." (SMF, ¶ 35). Indeed, no testimony was given on progressive discipline. Nevertheless, the Arbitrator concluded that the two-day suspension for Mr. Bishop's knowing violation of the required procedures for obtaining certification samples should be reduced to a written warning, with Mr. Bishop being made whole for the two days in question. (SMF, ¶ 32).

Article 24.1 of the CBA authorizes ConocoPhillips to discipline employees for "just cause," and Article 24.3 provides that "[c]ommitting a posted offense, failing to obey working rules, or unsatisfactory work performance may be cause for discipline." (SMF, ¶¶ 36-37). Neither of these provisions, nor any other provision of the CBA, specifies the penalties to be imposed for the commission of posted offenses, failure to obey work rules, or unsatisfactory performance. (SMF, ¶ 38).

The Grievance and Arbitration Procedure in the CBA provides that "[i]n reaching a decision, the arbitrator shall be restricted to the specific terms and provisions of this agreement, and shall not add to, subtract from, or in any way alter any of the provisions of this Agreement. (SMF, ¶ 39).

The Arbitrator disregarded this language and ordered that, although he found Mr. Bishop had clearly and knowingly violated the Company's procedures for obtaining certification samples, his two-day suspension should be reduced to a written warning.

II. ARGUMENT

A. The Court Should Grant Summary Judgment in ConocoPhillips' Favor, Vacating the Arbitration Opinion and Award.

Under Rule 56(c), summary judgment "shall be rendered" where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 46(c). Summary judgment "is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) (internal citations and quotations omitted).

As demonstrated *infra*, there is no genuine issue as to any material fact, and ConocoPhillips is entitled to judgment as a matter of law.

B. The Arbitration Award Should Be Vacated Because It Fails To Draw Its Essence From the Collective Bargaining Agreement.

1. Analytical Framework

Although an arbitrator's award is granted substantial deference, courts are "neither entitled nor encouraged to simply 'rubber stamp' the interpretations and

decisions of arbitrators." Matteson v. Ryder Sys., Inc., 99 F.3d 108, 113 (3d Cir. 1996) (quoting Leed Architectural Prods., Inc. v. United Steelworkers of Am., Local 6674, 916 F.2d 63, 65 (2d Cir. 1990) (holding that "[t]he deference owed to arbitration awards … is not the equivalent of a grant of limitless power")). "Courts still maintain a significant role in the labor arbitration process; they have not been relegated to the status of merely offering post-hoc sanction for the actions of arbitrators." Matteson, 99 F.3d at 113-14.

Under the Federal Arbitration Act, a court must vacate an arbitration award "where the arbitrators exceeded their powers…" 9 U.S.C. § 10(a)(4). Simply stated, an arbitrator may not venture beyond the bounds of his authority. Matteson, 99 F.3d at 113. See also Major League Umpires Ass'n. v. Am. League of Prof'l Baseball Clubs, 357 F.3d 272, 279 (3d Cir. 2004), cert. denied, 543 U.S. 1049.

An arbitrator derives his authority to resolve a dispute from the terms of the parties' collective bargaining agreement. See, e.g., Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 744 (1981) ("An arbitrator's power is both derived from, and limited by, the collective-bargaining agreement."); Georgia-Pac. Corp. v. Local 27, United Paperworkers Int'l Union, 864 F.2d 940, 944 (1st Cir. 1988) (holding that the "paramount point to be remembered in labor arbitration is that the power and authority of an arbitrator is totally derived from the collective bargaining agreement"). Therefore, the court must overturn an arbitration award "when the arbitrator's award does not 'draw its essence from the collective bargaining agreement' and the arbitrator is dispensing his or her own 'brand of industrial justice.'" Pa. Power Co. v. Local Union No. 272, Int'l Bhd. of Elec. Workers, 276 F.3d 174, 178 (3d Cir. 2001) (quoting United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960)). See also Citgo Asphalt

Refining Co. v. Paper, Allied-Indus., Chemical and Energy Workers Int'l Union Local No. 2-991, 385 F.3d 809, 816 (3d Cir. 2004) (stating that arbitrator's award is legitimate as long as it "draws its essence from the CBA and is not merely the arbitrator's own brand of industrial justice") (citation and internal brackets omitted); Pa. Power Co. v. Local Union No. 272, Int'l Bhd. of Elec. Workers, 886 F.2d 46, 48 (3d Cir. 1989) ("Where, however, an arbitrator substitutes his notions of industrial justice for the terms of the parties' agreement, he exceeds his authority.") (citing United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960)).

Where an arbitrator's award does not draw its essence from the collective bargaining agreement, and the arbitrator has exceeded his authority thereunder, courts within this Circuit have not hesitated to vacate the award. See, e.g., Citgo Asphalt Refining Co., 385 F.3d at 816 (3d Cir. 2004) (finding that arbitrator's determination that oil refiner's zero tolerance drug policy was unreasonable because it did not include "second chance" provision was outside scope of his authority and did not draw its essence from parties' collective bargaining agreement, where collective bargaining agreement provision prohibited him from substituting his judgment for employer's in absence of clear abuse of discretion); Pa. Power Co., 276 F.3d at 181 (holding that arbitrator exceeded scope of arbitration provision prohibiting him from changing or adding to any provisions of the parties' collective bargaining agreement, and his decision failed to draw its essence form the parties' agreement, where arbitrator "wrote into" the contract a provision obligating company to pay its union employees voluntary retirement benefits to which it never agreed); Pa. Power Co., 886 F.2d at 49 (finding that arbitrator's determination that grievance concerning proper evaluation and compensation for newly

created position was arbitrable exceeded scope of arbitrator's authority and was unenforceable, where collective bargaining agreement contained no wage rate for position, and agreement contained provision stating that arbitrator had no power to change, add to, or subtract from any provision of agreement). See also U.S. Steel and Carnegie Pension Fund v. McSkimming, 759 F.2d 269, 271 (3d Cir. 1985) (holding that arbitrator's award ordering pension fund to pay supplemental retirement benefits to former employee failed to draw its essence from the parties' pension plan, where arbitrator's award was based on his view of the requirements of ERISA rather than the on the plan itself).[2]

2. The Arbitration Award Should Be Vacated Because the Arbitrator Exceeded His Authority Under the CBA.

The parties' CBA explicitly states that "[i]n reaching a decision, the arbitrator shall be restricted to the specific terms and provisions of this agreement, and shall not add to, subtract from, or in any way alter any of the provisions of this Agreement." (CBA, Art. 25.8).[3] Despite this language, in rendering an arbitration award in favor of the Union, Arbitrator Light modified the language of the CBA to include a provision prescribing a five-step progressive discipline process, where no such provision exists in

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[2] Notably, this would not be the first time that Arbitrator Light has had an arbitration award vacated for exceeding the scope of his delegated authority and rendering an award that did not draw its essence from the parties' collective bargaining agreement, as it was Arbitrator Light's determination that was vacated by the Third Circuit in Citgo Asphalt Refining Co. v. Paper, Allied-Indus., Chemical and Energy Workers Int'l Union Local No. 2-991, 385 F.3d 809 (3d Cir. 2004). See Brief of Appellant at 3, No. 03-1503, 2003 WL 24302716, *2 (3d Cir. June 13, 2003).

[3] Clauses like this "limit the scope of arbitrable issues to those 'involving the interpretation or application of terms and conditions of employment that the parties have themselves agreed to in their contract.'" Pa. Power Co., 886 F.2d at 48 (citing Lodge 802, Int'l Bhd. of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, 835 F.2d 1045, 1047 (3d Cir. 1989); Jersey Nurses at 90). The Third Circuit has distinguished such "rights" arbitration from "interest"

the actual text of the CBA. In so doing, Arbitrator Light violated the provision of the CBA that prohibited him from adding to or altering its terms. This after Arbitrator Light found that "the grievant violated the written and required operating procedures for obtaining certification samples from Tank 157 on September 4, 2007" and "[h]e knew what those procedures were and he simply did not follow them, offering no legitimate excuse for not doing so" (SMF, ¶ 29), which factual findings were clearly just cause for discipline. He thus exceeded the scope of his contractually delegated authority. See, e.g., Pa. Power Co., 276 F.3d at 179 (vacating arbitration award because arbitrator exceeded his powers under the CBA by altering the CBA "in direct violation of [the CBA's] provision that he had no power to do so.").

Indeed, by writing a five-step progressive discipline process into the CBA, the Arbitrator created a new contractual right. An award that creates a new contractual right is the definition of an award that fails to draw its essence from the agreement and should be vacated on that basis alone. See Pa. Power Co., 886 F.2d at 48-49 ("When the parties have agreed to 'rights' rather than to 'interest' arbitration, the arbitrator exceeds her authority if she deems arbitrable those issues whose resolution calls for the addition of new terms or conditions to the agreement."); Jersey Nurses Econ. Sec. Org. v. Roxbury Med. Group, 868 F.2d 88, 90 (3d Cir. 1989) (same). See also Appalachian Reg'l Healthcare, Inc. v. United Steelworkers of Am., 245 F.3d 601, 607 (6th Cir. 2001); Mountaineer Gas Co. v. Oil, Chemical & Atomic Workers Int'l Union, 76 F.3d 606, 610 (4th Cir.), cert. denied, 519 U.S. 822 (1996).

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arbitration, where the parties have agreed to allow the arbitrator to set new terms and conditions of employment that are not contained in the CBA.

If the Union wanted the five-step progressive discipline process imposed by the Arbitrator, its obligation was to bargain and negotiate for such a right. "Parties to a collective bargaining agreement get what they bargain for – no less and no more … the [union] cannot gain through arbitration what it could not acquire through negotiation….To permit otherwise would undermine the entire purpose of collective bargaining agreements – namely to allow the parties to control the terms of their relationship through 'a system of industrial self-government.'" United States Postal Serv. v. Am. Postal Workers Union, 204 F.3d 523, 530 (4th Cir. 2000) (citing United Steelworkers of Am. v. Warrior & Gulf Nav. Co., 363 U.S. 574, 580 (1960)).

In support of its contention that the award should be confirmed, the Union will, no doubt, point to cases finding that "[i]n a *proper* cause an arbitrator … may construe a 'just cause' provision of a labor contract to include a progressive discipline requirement and may determine that certain conduct is 'just cause' for discipline but not for *discharge*." Arco Polymers, Inc., v. Local 8-74, 671 F.2d 752, 756 (3d Cir. 1982), cert. denied, 459 U.S. 828 (emphasis added). Notably, however, while the court in Arco-Polymers recognized use of a "just cause" provision to impose a progressive discipline requirement in the particular factual situation presented there, *i.e.*, *discharge* of an employee (as opposed to the lesser penalty of suspension at issue here), it did so in the context of an alleged discrepancy between provisions *already in* the agreement between the parties, not wholly new provisions added by the arbitrator. Id.

Furthermore, Arbitrator Light went well beyond the arbitral conduct approved of in Arco-Polymers and its progeny. Rather than simply interpreting "just cause" to require some general progression of discipline, he prescribed a *specific*, five-step process

(including a two-step suspension procedure) that ConocoPhillips is bound to follow, and he then concluded that, because Mr. Bishop's suspension was not the "next building block" in that process—the process *he* created—there was no just cause for the suspension. In essence, the Arbitrator substituted his own judgment as to what type of discipline process ConocoPhillips should follow, imposing requirements that do not flow from the CBA itself and are not supported by the record, and then held ConocoPhillips accountable for meeting those requirements. The words "just cause" in the CBA should not be a loophole through which the Arbitrator implements his own brand of industrial justice and creates a contract of his own by imposing additional requirements not expressly provided in the CBA.

In short, because the Arbitrator exceeded his authority under the CBA, his Award does not draw its essence from the parties' Agreement and should be vacated.

C. The Arbitration Award Should Be Vacated Because It Is Not Supported by the Record.

"A labor arbitration decision fails to draw its essence from the collective bargaining agreement . . . *if the record before the arbitrator reveals no support for the arbitrator's determination*." Citgo v. Paper, Allied-Indus., Chemical and Energy Workers Int'l. Union Local No. 2-991, 385 F.3d 809, 818 (3d Cir. 2004) (citing United Industrial Workers v. Government of the Virgin Islands, 987 F.2d 162, 170 (3d Cir. 1993)). See also NF & M Corp. v. United Steelworkers of Am., 524 F.2d 756, 760 (3rd Cir. 1975) ("[I]f an examination of the record before the arbitrator reveals no support whatever for his determinations, his award must be vacated.").

As noted *supra*, the parties' CBA contains no reference to a progressive discipline process, much less a requirement that ConocoPhillips adhere to the five-step progressive

discipline process prescribed by the Arbitrator. Similarly, the transcript of the hearing in this matter, and the exhibits introduced at that hearing, contain no reference to a specific progressive discipline procedure. Consequently, there is no record evidence supporting the Arbitrator's decision that ConocoPhillips was obligated to adhere to a five-part progressive discipline structure consisting of "an oral warning, a written warning, a penalty of some duration, perhaps a penalty of longer duration and subsequently, if no improvement is made, then termination." (Opinion and Award at 8). As such, the Arbitrator's decision should be vacated.

III. CONCLUSION

For the foregoing reasons, ConocoPhillips respectfully requests that the Court grants its Motion for Summary Judgment and vacate the Opinion and Award of Arbitrator Light in its entirety.

Respectfully submitted,

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