

**Matter of Amalgamated Tr. Union, Local 1179, AFL-CIO v MTA Bus Co.**

2009 NY Slip Op 30877(U)

April 16, 2009

Supreme Court, New York County

Docket Number: 115102/08

Judge: O. Peter Sherwood

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

PRESENT: O. PETER SHERWOOD  
*Justice*

PART 61

In the Matter of the Application of  
AMALGAMATED TRANSIT UNION,  
LOCAL 1179, AFL-CIO,

Petitioner,  
  
-against-

MTA BUS COMPANY,  
  
Respondent.

INDEX NO. 115102/08  
MOTION DATE Feb. 6, 2009  
MOTION SEQ. NO. 001  
MOTION CAL. NO. 4

The following papers, numbered 1 to 8 were read on this petition to confirm an arbitration award

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1-2</u>
Answering Affidavits — Exhibits _____	<u>3-5</u>
Replying Affidavits _____	<u>6-7</u>
Sur-Reply _____	<u>8</u>

Cross-Motion:  Yes  No

Upon the foregoing papers, the petition to confirm an arbitration award, dated September 25, 2008, and the cross motion to vacate the award are decided in accordance with the accompanying decision, order and judgment.

**WARNING: THIS JUDGMENT IS NOT TO BE RECORDED BY THE COUNTY CLERK AND NO COPY OF ANY ORDER IS TO BE FORWARDED THEREON. TO OBTAIN A COPY, COUNSEL OR AUTHORIZED REPRESENTATIVE MUST APPEAR IN PERSON AT THE JUDGMENT CLERK'S DESK (ROOM 141B).**

Dated: 4/16/09

O. Peter Sherwood  
O. PETER SHERWOOD, J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 61

-----X  
Application of  
AMALGAMATED TRANSIT UNION, LOCAL 1179  
AFL-CIO,

DECISION, ORDER  
AND JUDGMENT

Index No. 115102/2008

Petitioner,

For an Order Pursuant to CPLR Article 75 Confirming  
an Arbitration Award

-against-

MTA BUS COMPANY,

Respondent.

-----X  
O. PETER SHERWOOD, J.:

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk  
and notice of entry of judgment has not been served hereon. To  
obtain entry, counsel for the party who caused the judgment to be  
appear in person at the Judgment Clerk's Desk (Room  
1415).

Petitioner Amalgamated Transit Union, Local 1179, AFL-CIO ("Local 1179" or "petitioner") commenced the instant special proceeding pursuant to CPLR Article 75 seeking a judgment: (1) confirming an arbitration award rendered in its favor dated September 25, 2008; (2) directing respondent MTA Bus Company ("MTA") to reinstate the grievant, Adron Grate ("Grate" or "grievant"), and to make grievant whole for losses incurred as a result of MTA's non-compliance with the arbitration decision; (3) retaining jurisdiction to review any supplemental award of damages; and (4) awarding petitioner costs, disbursements and attorney's fees incurred in this proceeding.

Respondent MTA has cross moved for an order vacating and setting aside the arbitration award as irrational and in excess of the arbitrator's power and ordering a rehearing before a new arbitrator.

The Court has considered the following papers in determining this application to confirm an arbitration award and the cross motion to vacate the award and dismiss the petition: Notice of Petition, dated November 7, 2008; the verified petition, dated November 7, 2008, with exhibits "A" through "F"; Notice of Cross Motion, dated January 16, 2009; the affirmation of Robert Conti, Esq. of Bee Ready Fishbein Hatter and Donovan, LLP, attorneys for MTA, dated January 16, 2009, in opposition to the petition and in support of the cross motion, with exhibits "A" through "C"; the verified answer to the petition, dated January 16, 2009; respondent's memorandum of law in opposition to the petition and in support of the cross motion; affidavit of John Longo, President of Local 1179, dated January 30, 2009, in support of the petition and in opposition to the cross motion;

petitioner's memorandum of law in support of the petition and in opposition to the cross motion; respondent's reply memorandum of law.

This proceeding involves disciplinary charges against Grate, a bus operator who has been employed by the MTA since November 2003 (Pet's Exhibit "C"). On June 18, 2008, Grate was charged with: (1) being unavailable for service; (2) sick leave fraud and theft of time; and (3) excess absenteeism (Pet. ¶ 5; Pet's Exhibit "A") and he was terminated. Grate, who had no prior suspensions on his record, had worked for both the MTA and the New York City Department of Sanitation for approximately two years. Grate's hours of work at the Department of Sanitation were from either 7:00 a.m. to 3:00 p.m., or, in the summer, from 6:00 a.m. to 2:00 p.m., which apparently conflicted with his hours at the MTA. Local 1179 invoked the grievance procedure of the parties' collective bargaining agreement on Grate's behalf. After a Step II hearing, MTA upheld its decision terminating Grate (Pet's Exhibit "A"). The parties proceeded to arbitration before a single arbitrator, Theodore W. Kheel. A hearing was held on July 31, 2008, at which the parties appeared. The arbitrator also permitted the parties to submit post-hearing statements of fact based upon the proof adduced at the hearing (Pet. ¶¶ 8-12; Pet's Exhibits "B"- "D").

The arbitrator found based on the evidence that because of his second job at the Department of Sanitation Grate was unable to maintain his regular hours at MTA. He stated that "[t]he MTA Bus Company has the right to be concerned about any Bus Operator who works a second job which causes him or her to miss work or arrive late to work." (Pet's Exhibit "E"). The arbitrator concluded that "the grievant should be entitled to pick a 'steady run' which does not conflict with his hours of work at the Department of Sanitation \* \* \* [T]he grievant's run would have to be a 'p.m. run' which begins sometime after 3:00 p.m.". The arbitrator directed the MTA to reinstate Grate without backpay.

It is well settled that the scope of judicial review of an arbitration proceeding is extremely limited (*see*, CPLR § 7511 [b]; *Matter of United Fedn. of Teachers, Local 2, AFT, AFL-CIO v Board of Educ. of City School Dist. of City of New York*, 1 NY3d 72 [2003]; *Elul Diamonds Co. Ltd. v Z Kor Diamonds*, 50 AD3d 293 [1<sup>st</sup> Dept. 2008]). Despite this deference, an arbitrator's award may be vacated if "it is violative of a strong public policy, or it is totally irrational, or exceeds a specifically enumerated limitation on his power" (*Matter of Silverman [Benmor Coats, Inc.]*, 61 NY2d 299, 308 [1984]). In reviewing an award, the court is bound by the arbitrator's factual findings and interpretations of the contract (*see*, *Matter of New York State Correctional Officers & Police Benevolent Assn. v State of New York*, 94 NY2d 321, 326 [1999]).

In this case, the MTA argues that each of the exceptions to the limited scope of judicial review of arbitrator's awards are applicable and require vacatur of the arbitrator's award. Its

arguments are principally predicated upon the MTA's "8 Hour Rule", promulgated in Bulletin Order 1.33.04 pursuant to paragraph 12 of the collective bargaining agreement permitting the MTA to make rules governing the conduct of its employees, and providing, *inter alia*, that, except in an emergency, bus operators "are required to have 8 continuous hours off, at some point, between the earliest report time of the current day's assignment and the earliest report time of the following day's assignment" (Resp's Aff. ¶¶ 5-7; Resp's Exhibit "B"). This rule was effected on November 18, 2005, and represented a change from a provision of the collective bargaining agreement which provided in paragraph 19 thereof that: "All employees shall have at least ten (10) hours of rest at the completion of one day's work before entering into the next day's work." Respondent contends that one of the purposes of the 8 hour rule is to ensure that bus operators get sufficient rest so as to perform their duties in a safe manner.

MTA contends that the arbitrator's award is irrational and in excess of his authority in that it directs the MTA to violate the terms of the collective bargaining agreement and essentially rewrites the parties' agreement by abrogating the MTA's right to implement rules and regulations and granting the grievant a right not provided by the agreement, namely, the right to report to work without the requisite 8 hours rest and to choose a "steady run" which did not conflict with his hours at the Department of Sanitation. Respondent contends that the arbitrator also imperfectly executed his power by failing to address Grate's theft of sick time when he called in sick to the MTA while working at the Department of Sanitation during hours he was allegedly sick and receiving sick time from the MTA. Furthermore, respondent asserts that the award directs the MTA to violate its statutory obligation under Public Authorities Law § 1204 (15) to operate its transit system for the convenience and safety of the riding public. As such, the MTA contends that the arbitrator's award violates public policy considerations as it infringes upon its statutory authority and a special rule advancing its duty to protect the public. Specifically, the MTA states that presuming the most favorable conditions Grate would have no more that 6 hours and 41 minutes continuous time off between the end of his chosen MTA p.m. work schedule at 12:19 a.m. and the beginning of his Department of Sanitation work schedule at 7:00 a.m. This calculation does not even account for Grate's commuting time between home and each of his jobs.

Petitioner responds with an affidavit of its President John Longo who states that he was present at all stages of the arbitration the focus of which was the grievant's time and leave infractions and the MTA's argument that such infractions constituted just cause for the termination of Grate's employment with the MTA. Mr. Longo contends that the MTA's argument concerning the 8-Hour Rule, which petitioner asserts was not negotiated with Local 1179 and was unilaterally implemented, was not raised either at the arbitration or in the MTA's written submissions to the arbitrator. Nor

was any argument concerning MTA's rule making authority under paragraph 12 of the collective bargaining agreement raised. Indeed, the MTA has never demanded bargaining of the issue of dual employment by petitioner's members and no provision of the collective bargaining agreement restricts petitioner's members from being employed by a non-MTA employer while simultaneously being employed by the MTA. Petitioner contends that no public policy is violated as the 8-Hour Rule is not embodied in any statute or decisional law, but, in any case, such Rule only restricts the MTA from assigning its bus operators overtime or additional shifts where the number of hours between assignments is less than eight hours. It does not impose any limitation upon work performed for employers other than the MTA.

The MTA in a reply brief contends that petitioner's arguments concerning the 8-Hour rule should not be considered as they are being raised for the first time in reply papers. However, the respondent, by acknowledging that the issue before the arbitrator was the appropriate disciplinary action for Grate's infractions, seems to acknowledge that the 8-Hour Rule was not placed in issue.<sup>1</sup> Nevertheless, the MTA repeats its argument that the arbitrator's award is irrational and cannot be implemented as it contravenes the collective bargaining agreement, the rules promulgated thereunder and important public policy considerations.

A strict standard for overturning arbitrator's awards on the basis of the public policy exception has been established in New York caselaw. The courts have held the public policy exception to constitute "a narrow exception to the otherwise broad power of parties to agree to arbitrate all of the disputes arising out of their juridical relationships, and the correlative, expansive power of the arbitrators to fashion fair determinations of the parties' rights and remedies" (*Matter of New York City Transit Auth. v Transport Workers Union of Am., Local 100, AFL-CIO*, 99 NY2d 1, 7 [2002]). The restraint upon judicial review under the public policy exception has been found to be particularly appropriate in arbitrations held pursuant to public employment collective bargaining agreements since arbitrators are mutually chosen by labor and management presumably because of their particular expertise into the relationship and the needs of the parties and the judiciary will not necessarily possess the same experience and competence (*id.*). The preservation

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<sup>1</sup>Indeed, although its written statement of facts submitted to the arbitrator the MTA raised safety concerns, to wit, that "MTA has a managerial right (and obligation) to impose and enforce reasonable guidelines to ensure public safety and to ensure that Bus Operators are capable of performing their duties" (Pet's Exhibit "D"), it was not until after the arbitration award was issued that the MTA raised for the first time the issue of the 8-Hour Rule in a letter to the arbitrator dated October 14, 2008.

of the arbitration process is embedded in contract principles and must not be disturbed by the courts acting under the guise of public policy. Thus, vacatur of an award upon public policy grounds is permitted only where “strong and well-defined policy considerations embodied in constitutional, statutory or common law prohibit a particular matter from being decided or certain relief from being granted by an arbitrator” (*Matter of New York State Correctional Officers and Police Benevolent Assn. v State*, 94 NY2d 321, 327 [1999]). The focal point of the court’s inquiry is on the result, the award itself, which the court may vacate only “if the arbitration agreement itself violates public policy; if the award intrudes into areas reserved for others to resolve; or if, because of its reach, the award violates an explicit act of this State” (*id.*).

Here, there is no dispute that the MTA has the authority to adopt rules governing the conduct of employees and to discipline employees who violate the rules. It is also undisputed that the MTA and Local 1179 agreed pursuant to the collective bargaining agreement to arbitrate grievances of disciplinary actions and to accept as binding the arbitrator’s decision. Thus, the arbitrator’s determination to reinstate Grate without backpay and to permit him to choose a “steady run” derives its legitimacy from the collective bargaining agreement and the dispute as framed by the parties (*see, Matter of New York State Correctional Officers and Police Benevolent Assn. v State, supra* at 328).

With respect to the second prong of the public policy exception, Grate’s reinstatement is not a violation of any direct statutory requirement or standard for disciplining employees who violate MTA’s rules. The 8-Hour Rule in question is not expressly embodied in constitutional, statutory or common law. Rather, it was adopted by the MTA as an internal policy. Nor does section 1204 (15) of the New York Public Authorities Law which gives the MTA the legislative authority to operate the public transportation system of the City of New York for the safety of the public “translate into a statutory prohibition against some relinquishment to arbitrators of the final say in safety matters when they arise in the context of employee discipline” (*Matter of New York City Transit Auth. v Transport Workers Union of Am., Local 100, AFL-CIO*, 99 NY2d *supra* at 9). Moreover, although the award at issue directed reinstatement of the grievant, it did not do so in disregard for safety standards or by ignoring the grievant’s breach of MTA’s rules. Indeed, by not awarding backpay the arbitrator clearly imposed a financial sanction for Grate’s infractions. Although as the MTA points to the Public Authorities Law § 1204 (15) as the statutory basis for invalidating the award here, it seems that any change in the standards for disciplining employees violating safety rules must come about as the result of negotiation via the collective bargaining process and not unilaterally by one party or by judicial fiat. It is therefore determined that the arbitration award in the instant matter does not directly violate any public policy.

Furthermore, it cannot be said that the award is completely irrational since it was reasonable and justified by the evidence as presented to the arbitrator (*see, Matter of Local 333, United Mar.*

*Div., Intl. Longshoreman's Assn., AFL-CIO v New York City Dept. of Transp.*, 35 AD3d 211, 214 [1<sup>st</sup> Dept. 2006], *lv denied* 9 NY3d 805 [2007]). Contrary to MTA's contention, the award does not indicate that the arbitrator wrote a new contract for the parties or otherwise exceeded his authority (*id*; see, *Matter of Triborough Bridge and Tunnel Auth. v Triborough Bridge and Tunnel Auth. Bridge and Tunnel Officers Benevolent Assn.*, 51 AD3d 452, 453 [1<sup>st</sup> Dept. 2008]). The parties' collective bargaining agreement contains a broad arbitration clause which covers disputes such as disciplinary matters arising under the agreement and allows the arbitrator to fashion the relief or remedy as he sees fit. Such agreement makes no reference to the 8-Hour Rule so that it may not be said that the award exceeded any specifically enumerated limitation on the arbitrator's power.

Petitioner also requests that this Court: (1) direct the MTA to implement the arbitration award and make the grievant whole for losses incurred due to MTA's failure to implement the award; (2) retain jurisdiction over this proceeding to review any supplemental award of damages; and (3) award petitioner attorney's fees, costs and disbursements. The Court declines to retain jurisdiction over this matter as to do so would frustrate the purpose of the arbitration clause of the collective bargaining agreement to provide a single forum for the resolution of disputes arising therefrom. In addition, petitioner points to no provision of the collective bargaining agreement entitling it to attorney's fees, but, in any event, such issue would be a matter for arbitral, not judicial, determination

Accordingly, it is hereby

**ORDERED AND ADJUDGED**, that the petition is granted to the extent provided herein and the arbitration award dated September 25, 2008, which reinstated grievant Adron Grate without back pay, is confirmed; and it is further

**ORDERED**, that the MTA shall forthwith implement the award by reinstating Grate to the position of Bus Operator in compliance with the arbitration award; and it is further

**ORDERED**, that respondent's cross motion to vacate the arbitration award is denied.

This constitutes the decision, order and judgment of the court.

**DATED: April 16, 2009**

ENTER,



**O. PETER SHERWOOD**

J.S.C.

**FILED JUDGMENT**

This judgment has not been entered by the County Clerk and notice of entry must be served based hereon. To obtain a copy, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 7419).