

**Matter of Transport Workers Union of Greater N.Y.,
Local 100, AFL-CIO v Manhattan & Bronx Surface Tr.
Operating Auth.**

2009 NY Slip Op 33452(U)

October 15, 2009

Supreme Court, New York County

Docket Number: 102158/2009

Judge: Paul G. Feinman

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM PART 12

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In the Matter of the Application of
TRANSPORT WORKERS UNION OF GREATER
NEW YORK, LOCAL 100, AFL-CIO and ROGER
TOUSSAINT, as President of Transport Workers
Union of Greater New York, Local 100, AFL-CIO,
Petitioners,

Index Number 102158/2009
Mot. Seq. No. 001

- against -

MANHATTAN AND BRONX SURFACE TRANSIT
OPERATING AUTHORITY,
Respondent,

**DECISION, ORDER AND
JUDGMENT**

For an order pursuant to CPLR 7510 to confirm an
arbitration award..

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For the Petitioners:
Transport Workers Union
By: Ursula Levelt, Esq.
80 West End Avenue
New York NY 10023

For the Respondent:
Martin B. Schnabel, Esq., General Counsel
By: Michele Sheridan, Esq.
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*E-filed papers considered in review of this petition to confirm award:

Papers	E-File Number
Notice of Petition, Petition, Exhibits	1, 4
Petitioner's Memo of Law in Support	6
Verified Answer & Objections	9
Memo of Law in Opposition	10
Levelt Affirmation	5

PAUL G. FEINMAN, J.:

In this Article 75 proceeding, petitioners seek to confirm the arbitrator's award issued February 15, 2008, pursuant to CPLR 7510. Respondent opposes. For the reasons which follow, the petition is granted.

Petitioners are a labor organization and the president of the organization, who represented the interests of a bus operator, Lavien Sales, employed by respondent, during a grievance

proceeding after Sales was suspended from his duties on about September 19, 2007. The third step of the grievance, as provided by the collective bargaining agreement long in force between the two parties, was a hearing before an independent arbitrator. The date of the grievance hearing was adjourned more than once at the request of petitioner; the hearing was conducted on February 8, 2008. Both parties appeared and were represented by counsel and presented evidence.

As defined by the arbitrator, the issue was whether respondent had cause to suspend or dismiss Sales and, if not, what would be the remedy (Pet. Ex. A, Award). The arbitrator's decision states that bus operator Sales had been suspended after taking three "personals" in a two-hour time period without offering any explanation which respondent contended was a deliberate disruption of service. The arbitrator credited petitioners' testimony that Sales had recently undergone intestinal surgery and stated that in choosing to follow his physician's recommendations, his actions were not "deliberate" as to the disruption of service (Award pp. 1-2). The arbitrator faulted respondent for not asking Sales why he needed three personals in such a short time frame which, according to the arbitrator, "would have put the Grievant on clear notice that he was required to provide some explanation," and thus placed the burden on respondent to decide what course of action to take. The arbitrator's award, issued on February 15, 2008, found that "the Grievance is denied in part and sustained in part; LaVien Sales shall be reinstated with back pay for all the time off from his job, except the twenty (20) day Disciplinary Suspension imposed herein." (Award, p. 3). According to respondent, petitioner was restored to the payroll on March 11, 2008 (Ver. Ans. ¶ 10).

Petitioner moves to confirm, arguing that the arbitrator acted rationally and within his

authority under the collective bargaining agreement. Respondent opposes. It alleges that Sales is not entitled to receive any back pay. It points to the section under the collective bargaining agreement that states that when a case is adjourned when a grievant is suspended and MABSTOA is ready to proceed, the Authority is not liable for the back pay accrual (Ver. Ans. ¶ 17, citing Tomlinson Aff., Ex. A, Collective Bargaining Agreement § 2.1 [C] [19] [c]). It states that pay was withheld for the 20-day period from the date of the suspension until October 18, 2007, and that he has been given two checks covering the periods of October 17, 2007 through November 3, 2007 and January 9, 2008 through February 15, 2007, and another for the period February 16, 2008 through March 8, 2008 (Ver. Ans. ¶¶ 19- 20). It contends that the pay accrued during the period of adjournments requested by Sales and petitioners, that is from November 4, 2007 through January 8, 2008, is not reimbursable (Ver. Ans. ¶ 19). Respondent concludes that the matter is no longer alive, and that a confirmation of the award would have no effect because the matter is moot, citing *Saratoga County Chamber of Commerce, Inc. v Pataki*, 100 NY2d 801, 810-811 (2003) (holding that the courts are prohibited from ruling on academic and moot questions), and *Hearst v Kline*, 50 NY2d 707, 714 (1980) (holding that courts are normally precluded from considering questions that, once alive, have become moot by change of circumstances).

Subsequent to the grievance which is the subject of this proceeding, petitioners filed a grievance contesting the amount of back pay owed, and this grievance is pending (Levelt Aff. ¶¶ 4, 10; Ver. Ans. ¶¶ 22, 23, citing Tomlinson Aff. Ex. B).

CPLR Article 75 governs arbitration. Judicial review of arbitration awards is extremely limited (*Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 479 [2006], citing *United*

Paperworkers Intl. Union AFL-CIO v Misco, Inc., 484 U.S. 29 [1987]). An arbitration award will be upheld where the arbitrator “offers even a barely colorable justification for the outcome reached” (*Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 479 [2006], quoting *Andros Compania Maritima, S.A. v Marc Rich & Co*, 579 F.2d 691, 704 [2d Cir 1978]).

Here, the arbitrator’s decision was rational and justified. The respondent’s argument that the award has been rendered moot is not persuasive in light of the fact that, as petitioner points out, there is no evidence that Sales actually deposited checks marked “final settlement.” Notably absent from the answer are any exhibits such as copies of checks, whether cancelled or uncashed. Equally unpersuasive is the argument that this proceeding is premature because the award is not final. As drafted by the arbitrator, the award was final. The fact that the parties may have a new dispute as to how the award’s language should be interpreted does not render it less final.

Absent evidence supporting one of the bases set forth in CPLR 7511(b) for setting aside an arbitration award, the petition to confirm should be granted. Here, there is nothing in the record to support a finding of fraud, misconduct, corruption, partiality or that the arbitrator exceeded his authority. To the extent that the respondent is arguing a mistake of law by the arbitrator in formulating a remedy, the courts have consistently held that errors of fact and law are to be tolerated as part of the risk of arbitration and an award will not be vacated unless it somehow violates public policy, or is completely irrational (*see, Silverman v Benmor Coats*, 61 NY2d 299 [1984], *rarg denied sub nom. Norris v Cooper*, 62 NY2d 803 [1984]). Thus, the arbitrator’s award dated February 15, 2008, reinstating Lavien Sales and fining him 20 days’ suspension of pay, should be confirmed.

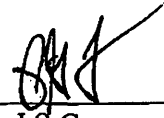
ORDERED AND ADJUDGED that the petition is granted and the arbitrator’s award

dated February 15, 2008 arbitration award which denied in part and sustained in part a grievance and directed that "Lavien Sales be reinstated with backpay for all the time off the job, except the twenty (20) day Disciplinary Suspension imposed" in the award is confirmed.

The foregoing shall constitute the decision, order and judgment of this court.

ENTER :

Dated: October 15, 2009
New York, New York



J.S.C.

HON. PAUL G. FEINMAN

FILED

Naomi Robinson
CLERK

NOV 30 2009

CLERK'S OFFICE
NEW YORK