IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 499, Plaintiff, vs. CHARITON VALLEY ELECTRIC COOPERATIVE, INC., Defendant.	**No. 4:07-cv-00559-JEG** **O R D E R**

This matter comes before the Court on Cross-Motions for Summary Judgment made by Plaintiff International Brotherhood of Electrical Workers, Local 499 (IBEW) and Defendant Chariton Valley Electric Cooperative, Inc. (CVEC). The parties have not requested a hearing, and the Court finds that no hearing is necessary. The matter is fully submitted and ready for disposition.

I. BACKGROUND

CVEC is an electrical power distributor with its headquarters in Albia, Iowa. IBEW represents all of CVEC's employees, except office clerical employees, professional employees, and supervisors as defined under the National Labor Relations Act (NLRA), see 29 U.S.C. §§ 151-69. IBEW and CVEC are parties to a collective bargaining agreement (CBA) governing the rates of pay, wages, hours of employment, and other terms and conditions of employment for CVEC's employees at the Albia facility, including William Sinclair (Sinclair). At the time pertinent to this claim, Sinclair has been classified as a first class lineman as defined in Article V of the CBA. Sinclair was injured on the job while working at CVEC. Sinclair has exhausted all his accrued vacation and sick leave since his injury and is receiving workers' compensation benefits. Sinclair has not been released by his medical advisors to return to the full scope of his

job duties as a first class lineman. CVEC's insurance carrier has approved Sinclair for long-term disability benefits.

On September 10, 2007, IBEW filed Grievance CV001 on Sinclair's behalf pursuant to Article II of the CBA, alleging CVEC violated Article III, Section 15, of the CBA because CVEC did not allow Sinclair to return to work in the first class lineman's position and perform the medically-permissible staking duty that he performed before his injury. Pl. Ex. B. IBEW complied with all contractual prerequisites to allow for the processing of Grievance CV001. On September 14, 2007, CVEC rejected Grievance CV001, asserting that Grievance CV001 was not arbitrable based upon Article II, Section 6, of the CBA.

On September 28, 2007, IBEW filed Grievance CV002 on Sinclair's behalf pursuant to Article II of the CBA, alleging CVEC violated Article II, Section 5(6), because CVEC terminated Sinclair without just cause and failed to grant him reasonable accommodations to return to work. Pl. Ex. C. IBEW has complied with all contractual prerequisites to allow for the processing of Grievance CV002. On November 6, 2007, CVEC rejected Grievance CV002, asserting Sinclair had not been discharged from employment and that Grievance CV002 was not arbitrable.

On December 13, 2007, IBEW filed an action in this Court seeking to compel CVEC into arbitration of Grievances CV001 and CV002. IBEW filed a motion for summary judgment, and CVEC filed a cross-motion for summary judgment. The parties agree that the material facts are undisputed, and this issue may be resolved by summary judgment.

II. DISCUSSION

A. Standard of Review

While much of the legal structure on the current motions is undisputed, the Court's own duty to determine if summary judgment should be granted, Fed. R. Civ. P. 56(c), requires a brief summary of the applicable standard. "Summary judgment is appropriate when no genuine issue

of material fact remains and the movant is entitled to judgment as a matter of law. . . . [I]f the record as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." Walnut Grove Partners, L.P. v. Am. Fam. Mut. Ins. Co., 479 F.3d 949, 951-52 (8th Cir. 2007) (citing Fed. R. Civ. P. 56(c) (internal quotation omitted)); see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986). In order to defeat a motion for summary judgment, the nonmoving party must do more than rest on its pleadings; it must demonstrate "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). "Summary judgment is appropriate only if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." Skare v. Extendicare Health Servs., Inc., 515 F.3d 836, 840 (8th Cir. 2008). "Mere allegations, unsupported by specific facts or evidence beyond the nonmoving party's own conclusions, are insufficient to withstand a motion for summary judgment." Menz v. New Holland N. Am., Inc., 507 F.3d 1107, 1110 (8th Cir. 2007). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Anderson, 477 U.S. at 248.

B. Arbitrability of Grievances

The question of arbitrability – whether the CBA creates a duty for the parties to arbitrate the grievance – is "undeniably an issue for judicial determination." AT&T Techs., Inc. v. Commc'n Workers of Am., 475 U.S. 643, 649 (1986); IBEW v. GKN Aero. N. Am., Inc., 431 F.3d 624, 627 (8th Cir. 2005) (same). "Arbitration is a matter of contract, and 'a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'" Crown Cork & Seal Co., Inc. v. Int'l Ass'n of Machs. and Aero. Workers, 501 F.3d 912, 916 (8th Cir. 2007) (quoting United Steelworkers of Am. v. Warrior & Gulf Nav. Co., 363 U.S. 574, 582 (1960)). When a contract contains an arbitration clause, there is a presumption of arbitrability because "[a]n order to arbitrate the particular grievance should not be denied unless 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, 475 U.S. at 650. Furthermore, where a CBA contains an arbitration clause, and there is not an express provision excluding a particular grievance from arbitration, "only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail." Id.; see also Teamsters Local Union No. 688 v. Indus. Wire Prods., Inc., 186 F.3d 878, 881 (8th Cir. 1999) ("When there exists an express agreement to arbitrate, there arises a presumption that the parties agreed to submit the dispute to arbitration unless there is clear intent 'that the parties did not want to arbitrate a related matter.'") (quoting First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 945 (1995)). "This presumption of arbitrability for labor disputes recognizes the greater institutional competence of arbitrators in interpreting [CBAs], 'furthers the national labor policy of peaceful resolution of labor disputes and thus best accords with the parties' presumed objectives in pursuing collective bargaining." AT&T, 475 U.S. at 650 (quoting Warrior & Gulf, 363 U.S. at 582-83). Because arbitration is a matter of consent, the presumption in favor of arbitrability must take into account the intent of the contracting parties. Indus. Wire Prods., Inc, 186 F.3d at 881. With that strident statement of the law as a point of departure, the Court examines the pending claims.

In the present case, Article II of the CBA outlines the grievance-arbitration procedure and exceptions to that procedure agreed upon by the parties. Pl. Ex. A. Specifically, Article II, Section One, Step Four states, "In case settlement is not made under Step Three within fifteen (15) days, either party may demand arbitration by delivering written notice to the Business Manager or Manager of the other party. Such arbitration shall be in accordance with the provisions of Section 2 of this Article." Id. at 6.

The parties' cross-motions for summary judgment ask the Court to determine whether Grievances CV001 and CV002 are arbitrable under the CBA.

1. Grievance CV001

Grievance CV001 complains, "[CVEC] is not allowing . . . Sinclair to come back to work in the [First Class] Lineman's position and do the staking duties which his medical qualifications would allow him to do." Pl. Ex. B. Therein, IBEW asserts that CVEC violated Article III, Section 15, which states, "Employees who because of age, physical disability, or lack of other qualifications are unable to perform fully the duties of a regular job classification, may be retained or employed by agreement between [CVEC] and [IBEW] as to the special conditions of their employment and rate of pay." Pl. Ex. A at 10. CVEC counters that whether Grievance CV001 is arbitrable is governed by Article II, Section 6, which is entitled, "Non-applicability of Grievance Procedure," and states,

> Wherever in this Agreement the Parties are, upon mutual agreement or consent, given the opportunity *to modify, deviate from, or make exceptions to* any of the provisions of the Agreement, the failure or refusal of the Parties, or either of them, to reach such agreement or to grant such consent, shall not give rise to a grievance, notwithstanding any of the other provisions of the Agreement.

Id. at 7 (emphasis added). The only dispute before the Court is whether Grievance CV001 is non-arbitrable under Article II, Section 6. Pl. SUF ¶ 14.

To deny arbitration of Grievance CV001, the Court must be convinced "the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." AT&T, 475 U.S. at 650. "[O]nly the most forceful evidence of a purpose to exclude the claim from arbitration can prevail." Id. Grievance CV001 alleges CVEC violated Article III, Section 15, by not restoring Sinclair to work as a first class lineman to perform the staking duties within his medical restrictions. Article II, Section 1, Step 3, Part f, mandates the use of the grievance-arbitration procedure to resolve "any difference[s] . . . between [CVEC] and [IBEW] involving the application or interpretation of any provisions of this [CBA]." Pl. Ex. A at 5. On its face, Grievance CV001 requires the arbitrator's interpretation and application of Article III, Section 15, to determine whether (1) the CBA requires CVEC to allow Sinclair to return to work subject to an

agreement "as to special conditions of [Sinclair's] employment and rate of pay," and failure to reach an agreement would initiate the grievance-arbitration procedure; or (2) it is entirely within CVEC's discretion to reach an agreement with IBEW "as to special conditions of [Sinclair's] employment and rate of pay." Pl. Ex. A at 10. The Supreme Court has repeatedly cautioned district courts not to make rulings on the merits because "[w]hether 'arguable' or not, indeed even if it appears to the court to be frivolous, the union's claim that the employer has violated the [CBA] is to be decided, not by the court asked to order arbitration, but as the parties have agreed, by the arbitrator." AT&T, 475 U.S. at 649-50; see, e.g., United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 37 (1987) ("The courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim." (quoting United Steelworkers v. Am. Mfg. Co., 363 U.S. 564, 567-68 (1960))).

In order to avoid arbitrating Grievance CV001, CVEC relies on Article II, Section 6, which states that either party's refusal "to modify, deviate from, or make exception to any of the provisions of [the CBA] . . . shall not give rise to a grievance." Pl. Ex. A at 6. CVEC is correct that the non-applicability of the grievance-arbitration procedure as set out in Article II, Section 6, trumps the general provision that the grievance-arbitration procedure must be utilized to determine the application or interpretation of the CBA. Here, however, Grievance CV001 does not seek to "modify, deviate from, or make exception to" the CBA. IBEW's strained interpretation of Article III, Section 15, would require CVEC to continue to employ IBEW members who may be unable to fully perform their jobs due to age, physical disability, or lack of other qualifications. IBEW argues that so long as the employee can perform some of the essential functions of the employee's job, the employer must retain the employee subject to the determination of the employee's rate of pay and classification. Grievance CV001 demands that CVEC restore Sinclair to the staking duties that a first class lineman may currently perform. Although CVEC

argues the arbitrator might conclude CVEC has no obligation to accommodate Sinclair because of the permissive language contained in Article III, Section 15, which states that "[e]mployees . . . unable to perform full duties *may* be retained," that decision is for the arbitrator, and not for the Court, to decide. See Misco, 484 U.S. at 37.

Article II, Section 6, will render a CBA provision non-arbitrable only if CVEC can produce "the most forceful evidence of a purpose to exclude the claim from arbitration." AT&T, 475 U.S. at 650. Article II, Section 6, does not define either (1) "may" as permissive and "shall" as mandatory, or (2) the "non-applicability of grievance procedure" as applying to "any provision of the CBA that confers discretion to either party is non-arbitrable;" and therefore the CBA lacks the type of "most forceful evidence" necessary to overcome the presumption of arbitrability of Article III, Section 15. Because it is possible for an arbitrator to conclude that IBEW's interpretation of Article III, Section 15, is correct, the non-applicability of grievance procedure does not control, and Eighth Circuit precedent requires the Court to compel arbitration of Grievance CV001. See, e.g., Indus. Wire Prods., Inc., 186 F.3d at 882 (compelling arbitration in a dispute involving the wage schedule provision of the CBA finding "the language of the arbitration clause [was] broad enough to encompass th[e] dispute," and even though the court was "not completely free from doubt, the Supreme Court has quite clearly told us that any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." (internal quotations omitted)); Local No. 381, Int'l Union of Operating Eng'rs v. Tosco Corp., 823 F.2d 265, 268 (8th Cir. 1987) (compelling arbitration because "[e]ven if [it were to] regard as frivolous the union's contention," the Eighth Circuit "[could not] take the issue away from the arbitrator"); IBEW, Local No. 4 v. KTVI-TV, 762 F. Supp. 264, 268 (E.D. Mo. 1991) (compelling arbitration because "an ambiguity exist[ed] concerning the interpretation of the contract"); cf. Int'l Ass'n of Machs. & Aero. Workers v. Republic Airlines, Inc., 829 F.2d 658, 660 (8th Cir. 1987) (denying a motion to compel arbitration because "[u]nlike AT&T, . . . there [was] an express contractual

provision specifically excluding from arbitration previously settled disputes" that "render[ed] the presumption of arbitrability inapplicable").

2. Grievance CV002

Grievance CV002 alleges, "[CVEC] terminated . . . Sinclair's employment without just cause, and has failed to grant him reasonable accommodations to return to work." Pl. Ex. C. IBEW asserts that CVEC violated Article II, Section 5(6), which states,

> [CVEC] shall have the right to discharge any employee for just cause. In the case of employees, other than probationary employees as defined in Article II, Section 3, [CVEC] will wherever possible consult the Business Manager of [IBEW] prior to such discharge. Such consultations shall not limit the right of the Cooperative to discharge any employee, If the Business Manager of the Union believes any such discharge to be unjustified, the matter shall be considered a grievance starting with Step Two, Section 1, of this Article. If it shall be found that any employee shall have been discharged without just cause, the employee shall be reinstated with full pay for all time lost and without loss of seniority rights. Any employee who shall willfully disregard generally accepted safety rules, drink beer or intoxicating beverage on the job or be proven dishonest shall be subject to immediate discharge, but failure to so discharge such employee shall not constitute a waive of right by [CVEC].

Pl. Ex. A at 7. Article II, Section 1, Step 3, Part e, discusses the grievance-arbitration procedure for discharging employees. Pl. Ex. A at 5. The CBA does not define the term "discharge." There is no dispute that Sinclair (1) is currently on long-term disability leave; (2) has been cleared to perform staking duties, but not the full range of duties, of the first class lineman job classification; and (3) has not received any wages from CVEC since September 30, 2007.

CVEC argues Grievance CV002 is non-arbitrable for three reasons. First, CVEC argues Sinclair has not been discharged because he is on medical leave. However, the parties agree that the grievance-arbitration procedure covers employee discharges. If the arbitration clause covers the asserted dispute, then IBEW's "claim that the employer has violated the collective-bargaining agreement is to be decided, not by the court asked to order arbitration, but as the parties have agreed, by the arbitrator." AT&T, 475 U.S. at 650. Resolution of Grievance CV002 requires the

arbitrator to determine whether CVEC has discharged Sinclair and, if so, whether there was "just cause" for the discharge. Pl. Ex. A at 7.

Second, CVEC argues that Sinclair's receipt of long-term disability benefits due to his inability to return to work precludes any inference that CVEC has discharged Sinclair. However, like CVEC's first argument, this argument is simply an invitation for the Court to decide IBEW's claim on the merits, which it will not do. GKN Aero. N. Am., Inc., 431 F.3d at 628 (limiting the district court's judicial review in determining arbitrability to "whether it was 'possible' for an arbitrator, consistent with the plain meaning of the agreement, to rule in favor of the party demanding arbitration"). IBEW argues that Sinclair was discharged from employment on September 21, 2007, after which time Sinclair no longer received wages or accrued seniority time. The CBA does not define "discharge," and the CBA is silent whether accruals of wages, seniority time, and health benefits are necessary conditions for employment. Therefore, in resolving Grievance CV002, the arbitrator must interpret the CBA to determine whether Sinclair was discharged. This matter is for the arbitrator to decide because "[t]he courts . . . have no business . . . determining whether there is particular language in the written instrument which will support the claim." Misco, 484 U.S. at 37.

Third, CVEC argues the arbitrator's only remedy under Article II, Section 5(6), is to return Sinclair to a job that he is medically incapable of performing, which is contrary to that section's remedy of the employee being "reinstated with full pay for all time lost and without loss of seniority rights." Pl. Ex. A at 7. While the Court is mindful that it cannot interpret the substantive provisions of the CBA, Grievance CV002 remedy appears limited to the express provisions of Article II, Section 5(6). In fact, the only remedy requested in Grievance CV002 is to "return . . . Sinclair to work within his medical restrictions." Pl. Ex. C. The arbitrator must determine whether the CBA requires an employee grievance to demand the full panoply of remedial options. As explained in Part A, it is possible to interpret the CBA in such a way that is consistent with

IBEW's interpretation. Accordingly, "even if [Grievance CV002] appears to the court to be frivolous," IBEW has presented an argument that CVEC breached Article II of the CBA by failing to follow the grievance-arbitration procedures for discharged employees, which "[must] be decided, not by the court asked to order arbitration, but as the parties have agreed, by the arbitrator." AT&T, 475 U.S. at 649-50.

C. Attorneys' Fees

"Under the longstanding American Rule, parties are required to pay their own attorney's fees unless an award of fees is authorized by statute." Kelly v. Golden, 352 F.3d 344, 352 (8th Cir. 2003). IBEW's action seeking to compel arbitration is governed by the Labor-Management Relations Act (LMRA), 29 U.S.C. § 185, which does not authorize attorneys' fees. See Actors' Equity Ass'n v. Am. Dinner Theatre Inst., 802 F.2d 1038, 1041 (8th Cir. 1986). There is, however, a "bad faith exception" that permits a district court to properly exercise its inherent power to award attorneys' fees when a party has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons." Chambers v. NASCO, Inc., 501 U.S. 32, 45-46 (1991) (quoting Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 258-59 (1975)); Actors' Equity Ass'n, 802 F.2d at 1042 (recognizing that "attorneys' fees may be awarded in an action brought under section 301 [of the LMRA], but only where the losing party clearly acted in bad faith"). If the Court determines the party acted in bad faith, the Court "must balance the equities between the parties," Actors' Equity Ass'n, 802 F.2d at 1043, and exercise its discretion only when there are "over-riding considerations that indicate the need for such a recovery," Mills v. Elec. Auto-Lite Co., 396 U.S. 375, 391-92 (1970). In a motion to compel arbitration of a grievance under a CBA, "bad faith would be evidenced in the present case by a showing that [management] intentionally advanced a frivolous contention for an ulterior purpose, such as harassment or delay." Actors' Equity Ass'n, 802 F.2d at 1043 (holding the district court abused its discretion granting attorneys' fees because management did not act in "bad faith in contending that the contract terms limited the

scope of the duty to arbitrate"). IBEW has not made any specific allegations that CVEC acted in "bad faith," and the Court concludes that CVEC had a good faith belief that Article II, Section 6, rendered Grievances CV001 and CV002 non-arbitrable. Accordingly, the Court denies IBEW's request for costs and attorneys' fees.

III. CONCLUSION

For the reasons stated above, Plaintiff's Motion for Summary Judgment (Clerk's No. 7) is **granted**, and Defendant's Motion for Summary Judgment (Clerk's No. 8) is **denied**. Plaintiff's Grievances CV001 and CV002 must be arbitrated. Plaintiff's request in the Complaint for attorney fees and costs is **denied**.

IT IS SO ORDERED.

Dated this 7th day of May, 2009.

JAMES E. GRITZNER, JUDGE
UNITED STATES DISTRICT COURT