[DO NOT PUBLISH]

In the

United States Court of Appeals

For the Eleventh Circuit

No. 21-12669

Non-Argument Calendar

COMMUNICATIONS WORKERS OF AMERICA,

Plaintiff-Appellee,

versus

BELLSOUTH TELECOMMUNICATIONS, INC.,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Georgia
D.C. Docket No. 1:19-cv-03307-WMR

Before LUCK, LAGOA, and BRASHER, Circuit Judges.

PER CURIAM:

BellSouth Telecommunications, LLC[1] appeals the district court's order denying its motion for summary judgment and granting Communications Workers of America's cross-motion for summary judgment. After careful review, we vacate the summary judgment for the union and remand for entry of summary judgment for BellSouth.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This case is before us for a second time, and the basic facts remain the same. BellSouth is a telecommunications service provider, and Communications Workers of America is a union representing BellSouth employees. BellSouth and the union entered into a collective bargaining agreement establishing wages, hours, and other terms and conditions of employment for BellSouth employees. Article 21.01 of the agreement laid out a four-step grievance process for resolving disputes between BellSouth and its employees. And article 23.01 provided for arbitration of disputes not resolved through the grievance process.

But certain types of disputes were excluded from arbitration. Article 19.04 of the agreement provided one such exception:

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[1] Although docketed here and in the district court as "BellSouth Telecommunications, Inc.," BellSouth is a limited liability company.

"Nothing herein shall be construed to subject the [benefit p]lans or their administration to the arbitration procedures of [a]rticle 23." Article 19.01 enumerated the benefit plans—including BellSouth's pension plans—incorporated by reference into the collective bargaining agreement.

The agreement also incorporated those pension plans into its definition of "seniority," with article 1.27 stating that "[s]eniority shall mean [t]erm of [e]mployment (TOE)/[n]et [c]redited [s]ervice (NCS) as defined by the applicable [p]ension [p]lan." An employee's seniority governed various matters, including "assignment of hours and vacations, layoffs, rehiring after layoffs, voluntary transfers, involuntary transfers[,] and promotions." Further, article 7.02(A)(8) provided that "[a]ny employee recalled under the provisions of this section within 5 years from the date of his/her layoff will have the continuity of his/her service protected, including seniority, and if his/her layoff was not for more than 6 months duration, he/she will be allowed service and seniority credit for such layoff unless it began within 12 months of a previous layoff."

BellSouth hired John Chris Butler in April 2013. Butler had worked two prior stints with BellSouth: from April 1999 to September 2008 (when he resigned) and again from October 2009 to April 2012 (when he was laid off). But when BellSouth rehired him the second time, the company gave Butler seniority credit only for his 2009 to 2012 tenure.

Butler believed BellSouth should've also bridged his seniority to include his first stint with the company. So the union filed a

grievance on his behalf, asserting that because Butler's only break in service was from 2008 to 2009—following his resignation—his "term of employment" should have included his service from 1999 until then. BellSouth denied the grievance at each step of the grievance process after concluding that Butler's seniority had been properly calculated.

The union requested to arbitrate the dispute, and BellSouth and the union scheduled an arbitration hearing. But the company later canceled the hearing based on its belief that the grievance was non-arbitrable. So the union sued to compel arbitration under section 301 of the Labor Management Relations Act, 29 U.S.C. section 185, alleging that BellSouth's refusal to arbitrate Butler's seniority grievance violated article 23 of the collective bargaining agreement.

The parties each moved for summary judgment, both sides arguing the issue of substantive arbitrability, and BellSouth asserting a statute of limitations defense. The district court granted BellSouth's motion as to the statute of limitations defense and dismissed the union's complaint as untimely, but we vacated and remanded for the district court to decide the arbitrability issue. *Commc'ns Workers of Am. v. BellSouth Telecomms., LLC*, 857 F. App'x 997, 1002 (11th Cir. 2021).

As to arbitrability, BellSouth argued that: (1) the grievance was challenging Butler's seniority calculation (on the basis that it didn't bridge his seniority); (2) under article 1.27 of the collective bargaining agreement, Butler's seniority was calculated as defined

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under his pension plan (the Bargained Cash Balance Program #2[2]); (3) the Bargained Cash Balance Program #2 administrator was "vested with the full and absolute discretion" to interpret the pension plan's bridging rules when calculating an employee's seniority; and (4) under articles 19.01 and 19.04 of the agreement, grievances related to BellSouth's pension plans—including the Bargained Cash Balance Program #2—and their administration were expressly excluded from arbitration.

The union asserted that: (1) the grievance wasn't disputing anything pension-related but instead was challenging BellSouth's compliance with articles 1.27 and 7.02(A)(8); (2) disputes under collective bargaining agreements with broad arbitration provisions (like the agreement here[3]) are presumptively arbitrable; (3) the agreement here contained no language excluding article 1 or 7 disputes from arbitration; and (4) any doubts about arbitrability must be resolved in the union's favor.

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[2] This pension plan is referred to as BCB2 throughout the record and briefs.

[3] Article 23.01(B) of the agreement read:

> If at any time a controversy should arise between the parties regarding the true intent and meaning of any provisions of this or any other agreement between the parties or a controversy as to the performance of an obligation hereunder, which the parties are unable to resolve by use of the grievance procedure, the matter will be arbitrated upon written request of either party to the other.

The district court agreed with the union, granting summary judgment in its favor and ordering BellSouth to arbitrate the grievance. The district court found that the grievance "center[ed] on whether Butler's [s]eniority was properly calculated to credit him for his 'continuity of service' as defined in [a]rticle 7.02(A)(8)." Although Butler's pension plan and the plan's administration "certainly may be implicated and involved in the dispute's ultimate resolution," the district court found that neither was "actually in dispute." The district court therefore concluded that article 19.04 did not operate to exclude the grievance from the collective bargaining agreement's arbitration provision.

STANDARD OF REVIEW

We review de novo a district court's order on cross-motions for summary judgment, viewing the facts in the light most favorable to the non-moving party on each motion. *Owen v. I.C. Sys., Inc.*, 629 F.3d 1263, 1270 (11th Cir. 2011). Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

DISCUSSION

Four longstanding principles guide our analysis here. First, "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." *AT & T Techs., Inc. v. Commc'ns Workers of Am.*, 475

U.S. 643, 648 (1986) (citations omitted). Second, the arbitrability of a dispute—that is, whether a collective bargaining agreement creates a duty to arbitrate a particular grievance—is an issue for judicial determination unless the agreement "clearly and unmistakably provide[s] otherwise." *Id.* at 649 (citations omitted). Third, a court should not consider the merits of a particular grievance at the arbitrability stage, instead considering only whether the parties agreed to arbitrate the dispute. *Id.* And fourth,

> where the contract contains an arbitration clause, there is a presumption of arbitrability in the sense that "[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."

Id. at 650 (citation omitted). Where an agreement's arbitration provision is broad, courts should look for an "express provision excluding a particular grievance from arbitration"; otherwise, "only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail." *Id.* (citation omitted).

Because Butler's grievance disputed his seniority calculation, and calculating seniority was the province of Butler's pension plan administrator, the grievance here squarely challenged the administration of Butler's pension plan. The grievance asserted that Butler had, by 2015, "completed enough service to now have his

term of employment include" his first stint with BellSouth—that is, Butler's "term of employment" had been calculated incorrectly because it failed to bridge his 1999 to 2008 stint. Article 1.27 of the collective bargaining agreement defined seniority as an employee's "term of employment" as defined by the employee's pension plan. So to dispute the calculation of Butler's "term of employment" was to dispute his seniority calculation.

And Butler's seniority calculation fell entirely within the administration of his pension plan. Article 1.27 adopted the pension plan's "term of employment" as Butler's "seniority" under the collective bargaining agreement. The plan's "Summary Plan Description," in turn, outlined rules for the "term of employment" calculation. These included three "Break in Service" rules detailing the impact of terminations and absences on an employee's "term of employment," as well as a series of special rules applicable under certain collective bargaining agreements or in specific scenarios. Under Butler's pension plan, the plan administrator had to apply the special rules to calculate an employee's "term of employment." Importantly, under the pension plan, the administrator had "full and absolute discretion to interpret the terms of the [p]lan . . . and all matters of fact with respect to [the administrator's] particular duties." All of these pension plan provisions were incorporated by reference into the collective bargaining agreement.

In short, Butler's grievance challenged the accuracy of a "term of employment" (that is, seniority) calculation governed by pension plan rules applied by a pension plan administrator who had

"full and absolute discretion" to interpret those rules. The grievance plainly disputed the pension plan and its administration. And the union admits that the collective bargaining agreement contained an express provision excluding the pension plans "or their administration" from arbitration. Because BellSouth did not agree to submit disputes like Butler's to arbitration, the grievance was not arbitrable. The district court therefore erred in granting summary judgment in the union's favor and ordering arbitration.

On appeal, the union maintains that Butler's grievance challenged only BellSouth's compliance with articles 1.27 and 7.02(A)(8) of the collective bargaining agreement—not Butler's pension plan or its administration. The union says article 7.02(A)(8) "provide[d] a right to certain employees recalled by [BellSouth] that impacts seniority," and that right didn't become non-arbitrable simply because the parties agreed to "tie seniority" under the collective bargaining agreement to BellSouth's pension plan calculations.

The union's position—that the grievance was about something other than how Butler's pension plan calculated his seniority—is inconsistent with how Butler's grievance arose. At the summary judgment hearing, BellSouth explained (without objection from the union) that Butler "received a letter from Fidelity—that's the [pension] plan administrator—that gave him his seniority date, and he did not agree with that . . . . So [they were], in fact, issues with regard to seniority, as indicated from the plan administrator, that started the dispute."

The union's position is also belied by its internal characterization of the dispute. In a staff request for arbitration approval prepared by Herman Junkin, Butler's union representative, Junkin stated that "the issue is not the [pension] plan. The issue is [BellSouth's] disregard for the language in [a]rticle 7.02(A)(8)." Yet Junkin observed that article 7.02(A)(8) and the pension plan "agree that an absence due to layoff should not be considered a 'break in service' and the employee should have the 'continuity of his/her service protected.'" So the problem was the pension plan's *application* of that rule when calculating Butler's seniority.[4] Indeed, Junkin framed the issue as BellSouth's "refusal to credit [Butler's] original period of service (1999–2008) after he completed three (3) 'continuous' years of service, *per the special rule for District 3 in the [pension] plan*." Junkin further explained that the union's "position is that more than one [break in service] condition in the chart *on page 30 of the [pension plan]* is applicable in this instance and that [BellSouth] is not adhering to the full language in Article 7.02(A)(8)." But, as the union official explained, application of the special break

[4] This is consistent with how Junkin described the dispute in his declaration. Junkin stated that Butler should've "had only to work 3 years to bridge all of his prior service," but Butler's "service was not properly credited." It's also consistent with the union's response to BellSouth's statement of material facts: the union did not dispute that BellSouth Pension Operations said its seniority calculation was correct but "dispute[d] that this assessment [was] correct, because Butler was not provided his full seniority" under article 7.02(A)(8) of the collective bargaining agreement.

in services rules fell within the administration of Butler's pension plan.

CONCLUSION

Because the collective bargaining agreement excluded disputes about BellSouth's pension plans and their administration from arbitration, BellSouth did not agree to submit Butler's grievance to arbitration. And because the grievance was not arbitrable, the district court erred in granting summary judgment in the union's favor and ordering arbitration. We therefore vacate the district court's summary judgment for the union and remand with instructions for the district court to enter summary judgment for BellSouth.

VACATED AND REMANDED with instructions.