

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

In re:

FURR'S SUPERMARKETS, INC.,

Debtor.

Case No. 11-01-10779-SA
Chapter 11

U.S. BANKRUPTCY COURT
ALBUQUERQUE, N.M.

**MEMORANDUM IN SUPPORT OF UNION'S VERIFIED PETITION FOR ORDER
COMPELLING ARBITRATION UNDER COLLECTIVE BARGAINING AGREEMENT**

United Food and Commercial Workers Union Local No. 1564 of New Mexico ("Union") submits this Memorandum in Support of Union's Verified Petition for Order Compelling Arbitration Under Collective Bargaining Agreement. As grounds therefore, the Union states:

I. STATEMENT OF FACTS

The facts necessary for proper resolution of this petition are set forth in the Union's Verified Petition for Order Compelling Arbitration Under Collective Bargaining Agreement (hereinafter "Verified Petition") and may be briefly summarized as follows. The collective bargaining agreement between Debtor Furr's Supermarkets, Inc. ("Furr's") and the Union contains a very broad grievance and arbitration clause. The Agreement Between Furr's Supermarkets, Incorporated and United Food and Commercial Worker's Union Local No. 1564, effective from November 1, 1998 to October 27, 2001, section 21.1, provides that:

Any and all matters of controversy, dispute or disagreement of any kind or character whatsoever existing between the Employer and the Union or Members of the Bargaining Unit and arising out of or in any way involving the interpretation or application of the terms of this Agreement shall be settled and resolved by the procedures and in the manner hereinafter set forth.

The Agreement then describes the grievance and arbitration procedures applicable to disputes involving the terms of the Agreement.

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There are three termination grievances pending in which court intervention is sought to compel Furr's to cooperate in proceeding forward with the arbitration process provided for in the collective bargaining agreement. The grievance numbers are 00-00433, 01-00122, and 00-00382. In all three, the Union has requested arbitration pursuant to section 21.1 but Furr's has failed to act upon the Union's requests to cooperate in the arbitration process and move the matters forward. See Verified Petition ¶¶ 7-10). Furthermore, the Union has attempted to contact Furr's officials on numerous occasions and has left messages with them but it has not received any response for weeks on any of these grievances. The Union asserts that these terminations violated the collective bargaining agreement, including § 5.2, which states that Furr's must have just cause to discharge its employees.

II. ARGUMENT: THE COURT SHOULD ORDER FURR'S TO ARBITRATE.

The threshold inquiry in resolving a motion to compel arbitration is whether there exists a valid, enforceable agreement to arbitrate. “[A]rbitration 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.” Zdeb v. Shearson Lehman Bros., 674 F. Supp. 812, 813 (D. Colo. 1987). The Supreme Court, in AT&T Technologies, Inc. v. Communications Workers of America, 475 U.S. 643 (1986) reaffirmed the broad presumption in favor of arbitrability established a quarter of a century earlier in the Steelworkers Trilogy. See United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of Am. v. American Mfg. Co., 363 U.S. 564 (1960).

A court “is not to rule on the potential merits of the underlying claim []” “even if . . . [the claim] appears to the court to be frivolous.” AT&T Technologies, 475 U.S. at 649-50. Where a

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 (quoting Warrior & Gulf, 363 U.S. at 582-83) (emphasis added); see also Communications Workers of America v. US West Direct, 847, F.2d 1475, 1477 (10th Cir. 1988). This favored presumption of arbitrability arises from the policies which are the underpinning of federal labor law. *Id.* The Tenth Circuit Court of Appeals has confirmed that “if the contract contains an arbitration clause, the dispute, whether or not it involves the interpretation of the contract, is subject to arbitration in the absence of specific language to the contrary” and “if it is unclear whether a company has agreed to arbitrate a specific issue, doubts must be resolved in favor of arbitration.” Johnson v. Beatrice Foods Co., 921 F.2d 1015, 1020 (10th Cir. 1990).

In this case, the collective bargaining agreement clearly states that all disagreements between the Union and Furr’s involving the collective bargaining agreement are to be submitted to the agreement’s grievance and arbitration procedure. The Union has three grievances pending in which it asserts that Furr’s has violated the collective bargaining agreement and in which the Union has requested arbitration. Furr’s has refused to cooperate in the arbitration process in violation of the collective bargaining agreement, so the Court should compel Furr’s to participate in good faith in the arbitration process.

Further, many courts in bankruptcy proceedings have compelled arbitration of post-petition grievances. In Gurga v. MCI Telecommunications Corp., 176 B.R. 196 (9th Cir. BAP 1987), the court reversed the bankruptcy court’s refusal to enforce arbitration in a breach of

contract action . “We are mindful of the goal of the Arbitration Act to ensure judicial enforcement of privately made arbitration agreements . . . and that arbitration is a form of dispute resolution that finds favor in the courts.” Id. at 200 (citations and quotations omitted). The court found the parties agreed to mandatory, exclusive arbitration of any claims arising from their contract. “There is nothing either explicit or inherent in the Bankruptcy Code excusing [debtor] from arbitration of these noncore claims.” Id.

Two cases relied on by the court in Gurga also found it appropriate for a bankruptcy court to compel arbitration. In Hays and Co. v. Merrill Lynch, 885 F.2d 1149 (3d Cir. 1989) the appellate court reversed denial of a motion to compel arbitration, finding no congressional intent to exclude arbitration in non-core adversary proceedings to enforce a claim of the estate:

Hays has pointed to no provisions in the text of the bankruptcy laws, and we know of none, suggesting that arbitration clauses are unenforceable in a non-core adversary proceeding in a district court to enforce a claim of the estate. To the contrary, as we have already noted, the text of the Bankruptcy Code embodies the principle that pre-petition contract rights are enforceable in a bankruptcy proceeding except to the extent the Code specifically provides otherwise and there are no contrary provisions applicable to this situation.

Id. at 1157. Citing recent Supreme Court decisions upholding arbitration in a variety of contexts, the court noted that “[t]hese cases establish that the Arbitration Act represents a clear congressional rejection of judicial skepticism regarding the utility of arbitration and a clear congressional mandate that private parties who contract for arbitration, as a more efficient method of dispute resolution, shall not have their bargains frustrated. Id. at 1160.” The court also relied upon the decision in Mor-Ben Ins. Markets Corp., 73 B.R. 644 (9th Cir. BAP 1987) affirming the bankruptcy court’s orders to arbitrate various non-core contract actions between debtor in possession and several insurance companies.

In In re Double TRL, Inc., 65 B.R. 993 (Bankr. E.D.N.Y. 1986) the court discussed the factors to be considered when deciding whether to allow arbitration in the bankruptcy setting, which are (1) the degree to which the nature and extent of the litigation and evidence makes the judicial forum preferable to arbitration; (2) the extent to which special expertise is necessary to resolve the disputes; and (3) the identity of the persons comprising the arbitration committee and their track record in resolving disputes between the parties. Id. at 998. The court refused to compel, but noted the absence of issues such as a labor dispute. “The issues to be resolved . . . do not require the special expertise which arbitrators might be able to bring to the decision-making process. There are no antitrust, ERISA, Workman's Compensation issues, or tax matters. Nor do we have labor disputes arising out of collective bargaining agreements.” Id. at 999. In the instant case, all of these special circumstances exist. The grievances sought to be arbitrated are grievances arising under a collective bargaining agreement as to which the special expertise of a labor arbitrator is required.

Bohack Corp., v. Truck Drivers Local Union No. 807, International Brotherhood of Teamsters, 431 F. Supp. 646 (E.D.N.Y. 1977), aff'd 567 F.2d 237 (2d Cir. 1977), a case decided before the revision of the Bankruptcy Code, highlights factors making arbitration most appropriate in the context of a labor dispute. “[I]n deciding whether a grievance or claim arising under a rejected collective bargaining agreement is appropriate for arbitration, the touchstone is whether arbitration will preserve labor peace, bring to bear the expertise of the arbitrator on issues such as working conditions or shop practices, and, at the same time, avoid usurpation of the bankruptcy court's critical role in the re-organization proceeding.” Id. at 653. Therefore, because the factors bankruptcy courts have considered in deciding whether to compel arbitration support

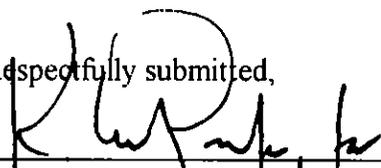
the Union's Verified Petition, the Court should compel arbitration in this case as well.

III. CONCLUSION

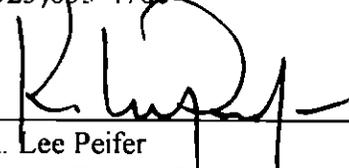
For the foregoing reasons, the Court should issue an order compelling Debtor Furr's Supermarkets, Inc. to participate in arbitration proceedings with the Union in good faith pursuant to the terms of the collective bargaining agreement between the parties and 29 U.S.C. § 185(a), and assist the Union in moving forward specifically with the grievance numbers 00-00433, 01-00122, and 00-00382.

DATED: October 16, 2001

Respectfully submitted,



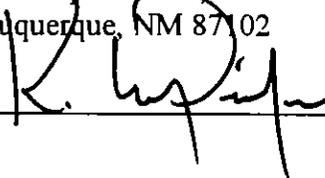
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I hereby certify that a true and correct copy of the foregoing pleading was sent via U.S. Mail this 16th day of October 2001 to:

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