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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEVEN M. JAEGER,
Acting Supreme Court Justice

In the Matter of the Application of ALTHEA ADAMS, VINCENT AGUANNO, GUSTAVO AGUILAR, JUAN C. ALAS, GUY ALCIDE, WAYNE ALEXANDER, JOSE L. ALVAREZ, JOSEPH T. AMAZAN, JOSE CARLOS ARBELAEZ, DWIGHT BALDWIN, JAMES J. BEACHY, DAVID J. BECKFORD, ADVERSE A. BENJAMIN, VIKTOR BERGER, ZIA A. BHATTI, JOSE RAUL BONILLA, ALEXANDER BREEDON, HOPELIN BROWN, HAROLD B. BURRIS, JEAN V. CALIXTE, JOEL CALIXTE, REINA CANALES, JOHN CATIDATE, SALVATORE CAPONE, SAVERIO M. CASSANO, NELSON CATIVO, BENNY CHEN, ZIA A. CHOUDHRY, SOO LIM CHUN, DENNIS CIANI, MARK A. CLARKE, GREGOIRE CLEMENT, CLARENCE COLLINS, FRANK COMPARATO, CARLOS M. CORNEJO, CARLOS CORTES, YESENIA COTTO, WILLIAM COURBOIS, TREVOR CROOKS, JOHN PAUL CUEVA, JOSEPH D'ANTONIO, JOHN DALY, MARK M. DAVIS, VINCENT DEMARCO, BRENDA DEMERITTE, WILLIAM DESPOT, JOSEPH DIXON, STEVEN F. DUREN, SILVAN EDWARDS, PATRICK ENAHORO, BIBI Z. ENG, WAI CHOY ENG, KATHY EVANS, GERARD FERRUS, MANUEL FIGUEIREDO, ANGEL A. FLAMENCO, MICHAEL T. FLANC, MATILDE FLORES, LINDA FOXX, LESLY FRANCOIS, CAL FROMER, JOSE GARCIA, EDUARDO GONZALEZ, SOONIE L. GOOSBY, CAROL GORDON, PATRICIO GUADALUPE, LEONARDO GUCCIARDO, PIERRE HARLAN, LENORA HASTINGS, JENNIE HERNANDEZ, VILA HERNANDEZ, RAYMOND HERRON, KIRK HOBBS, GROVER HOWELL, BARBARA HUGHES-

TRIAL/IAS, PART 39
NASSAU COUNTY
INDEX NO.: 007629-13

Motion seq #2

BEACHY, ROBERT ITCHKOW, GEORGE JACOB, CLINTON JONES, GERALD JEANTY, ALAN J. JOHNSON, RODOLPH SAINT JOY, FINDLEY KEROLLE, DUSHIK KIM, DOUGLAS KNOX, ROY KOHLE, THOMAS R. KOPECK, SURESH KURUP, KEVIN KWAN, MARK LAGANA, JEN LEE CHUNG, GUILLERMO LINARES, DEAN LING, MARK LOMUSCIO, ROBERT LOMUSCIO, THOMAS LOWITT, ROSA LUGO, ROBERT LYON, SALLY MARSHALL, PAUL MATEJEK, MIGUEL MATHUS, JAMES McCULLOUGH, JOHN McGHEE, DALMANE McGOWAN, FREDERICK MEISTER, STEVE MELENDEZ, MARIO MENDOZA, GERARD METAYER, CAROL MERCHARLES, LUIS MINGUEZ, JOHN MONTELIONE, GARY MOODY, PATRICK MOUSCARDY, FRED NARCISSE, DAVID NEHREBECKI, DOMENICK NESCI, HAROLD NICKELSON, JAMES OLIVER, MARTA ORELLANA, RODOLFO ORELLANA, JULIO PACAS, YEUK WA PANG, RICHARD PASCARIELLO, BRIAN D. PATRICK, JEANNOT PAUL, PATRICK PIEGARI, PIERRE POITEVIEN, RANDY RAMNARINE, ROBERT REYES, DEVON RIDGE, JAMES ROBINSON, JR., BERNARD ROHDE, SABAS DEJ ROMERO, WILLIAM ROTHWELL, AI X. RUAN, MARC P. RYAN, CARLOS SAGASTUME, JOSE A. SANTOS, SUSAN SBLENDORIO, ROBERT SCHALL, JOSEPH P. SCOTT, STEVEN P. SELEZNOW, IBRAR SHAH, WEN J. SHI, JAMES SCOTT SHOOK, RICHARD J. SMITH, CRESCENCIO E. SOLIS, MANASE SUAZO, PATRICK SWEENEY, MICHAEL TALIN, SHIRLEY TAYLOR, EARLIE TEEMER, BARNEY TRICE, KAM YIP TSUI, FRANCOISE TUMIELEWICZ, JUAN VALENCIA, RAUL VALENCIA, CANDICE VANDERMAST, DANNY A. VARGAS, ALFRED VASSEUR, STEPHEN VERNET, SERGIO VIERA, EUSEBIO G. VILLANEUVA, III, MARTIN VILLATORO, NICHOLAS VIOLA, JEROME VOELS, DAVID WHITE, GEORGE WHITING, IAN

WILLIAMS, LESLIE WILSON, HING FAI WONG, XIU TANG WU, PIERRE RICHARD ZAMOR, QIA SHEN ZHAO, and JOHN DOES 1-100,

Petitioners,

For an Order Pursuant to Article 75 of the CPLR to Compel The Arbitration of Certain Controversies

-against-

METROPOLITAN TRANSPORTATION AUTHORITY, MTA-LONG ISLAND BUS, NASSAU COUNTY, and VEOLIA TRANSPORTATION SERVICES, INC.

Respondents.

MOTION SUBMISSION DATE: 9-17-14

MOTION SEQUENCE NO. 002

The following papers read on this motion:

Notice of Verified Petition, Verified Petition, and Exhibits	X
Sur-Reply Memorandum	X
Affidavit and Exhibit	X
Verified Answer (Nassau County)	X
Verified Answer (Plaintiff)	X
Verified Answer (MTA)	X
Petitioner's Memorandum of Law	X
Memorandum of Law (Veolia)	X
Affirmation of Thomas J. Deas, Esq.	X
Sur-Reply Memorandum of Law (Veolia)	X
Memorandum of Law (MTA)	X
Affidavit of Diane S. Ialenti and Exhibits	X
Affirmation in Opposition	X
Reply Affirmation	X

Motion by the attorney for the petitioners for an order directing that the controversies described in the annexed petition between the petitioners and respondents proceed to final and binding arbitration with the American Arbitration Association is granted.

This is a special proceeding pursuant to CPLR Article 75 to compel arbitration with 173 current and former transit and transportation employees who allege injury as a result of an alleged violation of Section 13(c) of the Federal Transit Act 49 U.S.C. § 5333(b) (referred to hereinafter as Section 13[c]).

Respondent Veolia Transportation Services, Inc. (Veolia or the company) is a Maryland-based corporation that provides, pursuant to contract, management, operation and maintenance services for transportation systems nationwide, particularly in the mass transit sectors utilizing rail, light rail, and bus systems in some of the nation's most high-density urban and suburban settings. Veolia has established a number of such operations through public-private partnerships aimed at replacing purely publicly-operated transit systems. Until January 1, 2012, public buses in Nassau County (the County) operated for approximately forty years by the Metropolitan Transportation Authority (MTA) through its subsidiary Metropolitan Transportation Authority-Long Island Bus (MTA-LI Bus), under

contract with the County. MTA, the MTA-LI Bus and Nassau County are also named co-respondents in the within action.

In or about December 2011, the County's Legislature voted unanimously to replace the MTA and MTA-LI Bus as the operator of the County's busing network. A contract for the operation of the buses was awarded to Veolia, who assumed responsibility for operating the bus system. The service was re-designated as NICE on or about January 1, 2012 pursuant to the Fixed Route Bus and Paratransit Operation, Management and License Agreement between the County of Nassau and Veolia Transportation Services, Inc. (the Operating Agreement).

Under the Operating Agreement, petitioners allege Veolia assumed (and the County retained) various contractual and legal obligations from agreements concluded by and between the previous parties, and other outside parties (the Previous Agreements).

Nassau County agreed to allow Veolia to utilize all of the equipment and assets that had been used to operate MTA LI Bus, including all of the Federal Transit Act (FTA) funded equipment, real property, offices, facilities, vehicles, inventory, computers, software, supplies, materials, furniture machinery and intellectual property. In addition to being given the license to use all of Nassau

County's FTA-funded equipment and assets to run the bus service, Nassau County was required to pay Veolia "compensation," for the operation of the bus service in Nassau County. Plaintiffs assert that part of the "compensation" to be provided by the County to Veolia included FTA funding that had been previously granted to Nassau County and the MTA to operate MTA LI Bus but had not yet paid out, and were covered by the 13(c) Agreements.

Within the Previous Agreements was a "Unified Protective Arrangement" (UPA) implementing the provisions of § 5333(b) of the Federal Transit Act - informally described as "Section 13(c)" – which provides, *inter alia*, for the protection of the rights of transit workers who suffer displacement or a worsening of economic conditions as the result of a federally-funded transit project. In relevant part, Section 13(c) entitles employees who are either "displaced" or "dismissed" as a result of the receipt of federal transportation-based funding to various "allowances." Petition alleges that as a condition of the receipt of "millions and millions of dollars" in federal transit funds, the respondents were obligated to abide by the 13(c) Agreements. Under the terms of the Operating Agreement, in the context of its January 1 assumption of bus operations, Veolia made offers of employment to every qualified MTA-LI Bus employee represented by TWU who applied for employment. The employees who accepted these offers

of employment experienced a technical termination of employment from MTA-LI and were immediately employed by Verolia without a gap in employment in the handover of operations from MTA-LI Bus to Verolia. Among those who commenced employment with Veolia following the transition of bus operations were the petitioners in this action, 164 of whom accepted positions with Veolia under the terms of the TWU collective bargaining agreement. Respondent asserts the petition erroneously includes three individuals who were not active employees of MTA-LI Bus at the time Veolia assumed bus operations and thus were not hired, three who were never TWU members, and three who trained with but never worked for Veolia. Of the 164 who accepted positions under the collective bargaining agreement, 150 continue to be employed by Veolia and remain represented by TWU Local 252, five are no longer represented by TWU due to promotion out of the bargaining unit, and nine have left Veolia through resignation or termination.

Petitioners assert most of the petitioners were hired at lower wages with less benefits. Days before Veolia took over the Nassau County bus operations, on December 5, 2011, the Nassau County Comptroller issued a "Review of License Agreement between the County of Nassau and Veolia Transportation Services, Inc." (Comptroller Report). This report acknowledges that petitioners were

entitled to 13(c) displacement allowance if they were dismissed or rehired by Veolia at a lower rate of compensation or with fewer benefits.

In the Operating Agreement, Veolia agreed that it would be bound by "the Unified Protective Arrangements applicable to the workforces to which the County now and in the future is bound . . . pursuant to Section 13(c) and accept [sic] responsibility with the County for the full performance of the conditions in said 13(c) Agreements . . .[.]" Among other things, the applicable UPA contains the following language relating to disputes and their resolution: "Any dispute, claim, or grievance arising from or relating to . . . the application or enforcement of the provisions of this arrangement . . . which cannot be settled by the parties within thirty (30) days after the dispute or controversy arises, may be submitted at the written request of the recipient(s) or the union(s) in accordance with a final and binding resolution procedure mutually acceptable to the parties. Failing agreement within ten (10) days on the selection of such a procedure, any party to the dispute may request the American Arbitration Association to furnish an arbitrator and administer a final and binding arbitration."

The TWU local did not invoke the petitioners' 13(c) claims. With the assistance of shop steward and union representative Nicholas Viola, one of the petitioners, they sought independent legal assistance to invoke their 13(c) claims.

Petitioners' attorney sent a letter to respondents, asserting petitioners' 13(c) claims and demanding the claims be arbitrated. By letter, the respondents refused to arbitrate. The petitioners commenced the within action to compel arbitration.

In the within proceeding to stay or compel arbitration, the Court must resolve the threshold questions of whether the parties made a valid agreement to arbitrate and if such an agreement was made has it been complied with (see CPLR 7503(a); CPLR 7502(b); *Matter of United Nations Dev. Corp. v Norkin Plumbing Co.*, 45 NY2d 358).

In *Matter of Arbitration County of Rockland (Primiano Const. Co.)* 51 NY2d 1, 7-8, the New York Court of Appeals stated that:

> If, however, it is concluded that the parties did make an agreement to arbitrate that the particular claim sought to be arbitrated comes within the scope of their agreement, there then may be a second threshold question for judicial determination – has the agreement that they made been complied with? This calls for a judicial determination as to whether there is any preliminary requirement or condition precedent to arbitration to be complied with and, if so, whether there has been compliance with such requirement or condition precedent.
>
> Thus, the parties may be erected a prerequisite the submission of any dispute to arbitration, in effect a precondition to access to the arbitral forum. In such event the reluctant party may be forced to arbitration only if the court determines that this portion of the agreement to arbitrate has been complied with – for example, where the parties agreed that disputes must first

> be submitted to a partnership for determination or where contractual limitations are expressly made conditions precedent to arbitration by the terms of the arbitration agreement (*Matter of Raisier Corp.*, [internal citations omitted]).

Respondents assert petitioners failed to follow "Contractual Dispute Resolution Procedures" since petitioners did not "engage in an informal joint investigation procedure before the claim may be submitted to binding arbitration." According to Veolia's Michael Setzer, Vice President for Transportation Services for Veolia, petitioners were required to give Veolia notice of a dispute from individual petitioners or a proposal to meet and confer with respect to an alleged dispute relating to the claims referenced in the petition. None of the 13(c) Agreements state that the parties must engage in an informal joint investigation procedure, as respondents argue.

Paragraph 15 of the 2008 and 2011 13(c) Agreements, Paragraph 18 of the 1973 13(c) Agreement, Paragraph 15 of the 1999 Operating 13(c) Agreement, and Paragraph 4 of the 1999 Capital Assistance 13(c) Agreement, only state that if a dispute arises that cannot be settled within thirty (30) days after the dispute or controversy arises, that said dispute, claim or grievance may be submitted at the written request of the Recipient(s) or the Union(s) in accordance with a final and binding resolution procedure mutually acceptable to the parties. This is not a

mandatory provision. These provisions allow the parties to submit a dispute in accordance with any procedure they might agree on.

Paragraph 16 of the 2008 and 2011 13(c) Agreements states that once the employee makes a claim, "[t]he Recipient [Nassau County, MTA or Veolia] will fully honor the claim . . . In the event the Recipient fails to honor such claim the Union may invoke the following procedures for joint investigation of the claim by giving notice in writing of its desire to pursue such procedures. Within ten (10) days from the receipt of such notice, the parties shall exchange such factual material as may be requested of them relevant to the disposition of the claim and shall jointly take such steps as may be necessary or desirable . . ." The "exchange of factual material" is only required if the Recipient fails to honor the claim and the union invokes its right to require Respondents to engage in a joint investigation, exchange of materials, and demand of information from third parties as necessary. This paragraph does not require petitioners to do anything prior to requesting that respondents arbitrate their 13(c) claims. There is no mandatory condition precedent requiring petitioners to make an effort to resolve their dispute through informal negotiations and the exchange of factual materials prior to demanding arbitration.

The Certification Letter states that "[d]isputes over the interpretation, application and enforcement . . . of the certified protective arrangements . . . shall be resolved in accordance with the procedures specified in certified arrangements." The last paragraph of the Certification Letters states, "[s]hould a dispute remain after exhausting any available remedies under the protective arrangements and absent mutual agreement to utilize any other final and binding resolution procedure, any party to the dispute may submit the controversy to final and binding arbitration."

Petitioners, as individuals, and respondents did not have a final and binding resolution procedure in place, except for the mandate in the 13(c) Agreements that all disputes will be resolved through final and binding arbitration. Paragraph 15 of the 2008 and 2011 13(c) Agreements suggests a process that the parties may follow, and if they want, they can agree to enter into an alternative method of resolving the dispute. Unless the parties agree to resolve the dispute in any other way, "any party to the dispute may request the American Arbitration Association to furnish an arbitrator and administer a final and binding arbitration under its Labor Arbitration Rules" or request the Labor Secretary to assist in arbitration. There is nothing in the 13(c) Agreements or the Certification Letters that require a notice of intent to arbitrate be sent within any amount of time. The 13(c)

Agreements state that if the dispute cannot be settled within thirty (30) days after the dispute arises, the matter can be submitted to a resolution procedure mutually acceptable to both sides. Because petitioners and respondents did not agree to a mutually agreeable resolution procedure, either party then could request the American Arbitration Association or the Department of Labor to furnish an arbitrator.

Pursuant to Paragraph 16 of the most recent 13(c) Agreements and Paragraph 17 of the 1999 13(c) Agreements, the only requirement is that the claim be brought within sixty (60) days of termination or within eighteen (18) months of the employee's worsened compensation and benefits. Petitioners all claim that their pay and benefits have worsened as the result of Veolia's takeover of equipment, property, intellectual property, bus route, and vehicles.

Paragraph 16 of the 2008 and 2011 Section 13(c) Agreement states:

> The Recipient will be financially responsible for the application of these conditions and will make the necessary arrangements to that any employee affected, as a result of the project, may file a written claim through his or her Union representative with the Recipient within sixty (60) days of the date the employee is terminated or laid off as a result of the project, or within eighteen (18) months of the date the employee's position with respect to his/her employment is otherwise worsened as a result of the project. In the latter case, if the events giving rise to the claim have occurred over an extended period, the 18-month limitation shall be measured from the last such event.

There is nothing in this paragraph that requires the employee to give a demand to arbitrate within sixty days. This paragraph states that the Recipient (MTA, Nassau County and now Veolia) are financially responsible for the protective conditions agreed to in exchange for the FTA grant money, and that the Recipient will provide a process whereby the employee can, if he or she wants, to make a claim. Petitioner had eighteen (18) months from the day that the petitioners' employment positions were worsened to make a claim with the Recipient – not to demand arbitration. Petitioners claim that their employment conditions have been worsened as of December 31, 2011, and that eighteen (18) months to file a claim with the Recipients (Nassau County, MTA and now Veolia), which would be June 30, 2013. On May, 22, 2013, attorney Stuart Salles, sent a letter to the MTA, Veolia, Nassau County and MTA-LI Bus, advising them that he represents the approximately one-hundred and seventy-five (175) former MTA-LI Bus employees who were adversely affected by the Veolia takeover and were entitled to compensation under the various Section 13(c) agreements. In the May 22, 2013 letter, Mr. Salles stated that the "UPAs [or Section 13(c) agreements] require that all disputes be resolved pursuant to arbitration. Unless you or your clients agree to immediately arbitrate this dispute" Petitioners would be filing a proceeding to compel arbitration. Petitioners made their claim within eighteen

(18) months from the date they were first adversely affected. Respondents failed to agree to arbitrate the dispute, and petitioners commenced this proceeding to compel arbitration on June 24, 2013, well before the eighteen months passed.

Respondents' assertion that petitioners were bound to comply with CPLR 7503(c) is misplaced. "[A] party may serve upon another party a demand for arbitration" (see CPLR 7503[c]). If a notice compliant with CPLR 7503(c) is properly served, then the onus is on the receiving party to file an application to stay arbitration within twenty days or else he or she will be compelled to arbitrate. CPLR 7503(c) is not applicable to the within action.

The Court concludes that the parties made a valid agreement to arbitrate, that the dispute sought to be arbitrated falls within its scope, and there has been compliance with any agreed on conditions precedent to arbitration. The scope of the issues in dispute that may be raised in the arbitration include, but are not limited to, the standing of the petitioners in the absence of the TWU; whether the MTA was excluded from any responsibility for the 13(c) claims, and whether the petitioners are asserting a valid claim that they were harmed by a "project" as that term is defined by the Agreements entitling them to relief. Judicial inquiry is at an

end and the parties are directed to proceed to arbitration as requested in the Petition.

Dated: October 24, 2014

HON. STEVEN M. JAEGER, A.J.S.C.