DISTRICT COURT **CITY AND COUNTY OF DENVER, COLORADO** **1437 Bannock Street** **Denver, Colorado 80202**	**▲COURT USE ONLY▲**
Plaintiff: **AMALGAMATED TRANSIT UNION, LOCAL 1001** **v.** **Defendant:** **REGIONAL TRANSPORTATION DISTRICT**	**Case Number: 2010 CV 3585** **Courtroom: 7**
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MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

Defendant Regional Transportation District ("RTD"), by and through counsel, RTD Assistant General Counsel Derrick K. Black and Deputy General Counsel Rolf G. Asphaug, moves pursuant to C.R.C.P. 12(b)(5) to dismiss the Complaint of Amalgamated Transit Union Local 1001 (the "Union") for failure to state a claim.

I. SUMMARY OF ARGUMENT

1. This is a proceeding under the Colorado Uniform Arbitration Act ("CUAA"),

C.R.S. § 13-22-201 *et seq*. Under the CUAA, "[A]n application for judicial relief under this part 2 must be made by motion to the court and heard in the manner provided by law or court rule for making and hearing motions." C.R.S. § 13-22-205(1) (emphasis added); *see BFN-Greeley, LLC v. Adair Group, Inc*., 141 P.3d 937, 941-42 (emphasizing same).

2. RTD's motion to dismiss for failure to state a claim is made because the Union has filed a Complaint based solely on a claim that the arbitrator exceeded his powers. However, the CUAA allows such a claim only where an arbitrator ***ignores*** or ***refuses to apply*** contractual restrictions on his powers. *Giraldi v. Morrell*, 892 P.2d 422, 424 (Colo. App. 1994). The Union alleges that the arbitrator ignored such restrictions in the parties' collective bargaining agreement, but the arbitrator's decision – incorporated in full into the Union's Complaint – demonstrates that the arbitrator did not ignore or refuse to apply restrictions on his authority but instead carefully referenced, discussed and honored them at the very outset of his analysis. The Complaint is therefore fatally defective under Rule 12(b)(5). Since this proceeding is to be resolved by motion in any event, with the Union bearing the burden of proof, *id*., dismissal is especially appropriate at this time since the arbitrator's decision shows on its face that he did not exceed his powers.

II. UNDISPUTED FACTS

3. This proceeding is "an application for judicial relief under this part 2" of the CUAA. C.R.S. § 13-22-205(1).

4. The Union seeks in this proceeding to vacate Arbitrator Anthony Redwood's March 1, 2010 arbitration award, a copy of which the Union has attached to its Complaint and

fully incorporated into the Complaint by reference.[1]

5. RTD and the Union are parties to a collective bargaining agreement. Complaint at 2, ¶ 5.

6. In the 2006 collective bargaining negotiations between RTD and the Union, RTD proposed and the Union accepted the addition of the words "the right to create positions" to Article I, Section 5 of the parties' collective bargaining agreement, "for the explicitly stated purpose of clarifying management rights in this sphere and in particular that the creation of positions could take place at any time and not just during contract negotiations." Complaint Attachment A at 3.

7. On October 14, 2009, after the current 2009-2012 collective bargaining agreement had gone into effect, RTD advised the Union that it was creating a part-time Information Specialist position. RTD invited the Union to negotiate the position's wages, benefits and working conditions. The Union chose not to negotiate. Complaint Attachment A at 3-4, 11-13.

8. The Union instead filed a grievance which went to arbitration before Arbitrator Redwood. The stipulated issue for arbitration was: "Did the RTD exceed its authority under the collective bargaining agreement when it implemented the part-time Information Specialist position, and if so, what is the remedy?" Complaint Attachment A at 4.

9. The arbitration hearing was held on January 22, 2010. Complaint Attachment A, p. 1. The parties stipulated that the matter was properly before the Arbitrator. Witnesses were

[1] The Complaint states that Arbitrator Redwood's award is Attachment B, *see* Complaint p. 4 ¶ 12, but the award is marked as Attachment A. A second attachment to the Complaint is cited as Attachment A, *see* Complaint p. 3 ¶ 6, but is marked as Attachment B. RTD will refer to Arbitrator Redwood's award as Attachment A.

sworn and were subject to cross-examination. RTD submitted eleven exhibits, and the Union nine. Post-hearing briefs were received. Complaint Attachment A at 1.

9. Arbitrator Redwood's March 1, 2010 award included approximately 4-1/2 pages devoted to detailing the positions of the parties, and another 6 pages of detailed analysis. Complaint Attachment A at 8-14.

10. In his award, Arbitrator Redwood expressly considered whether previously existing provisions in the collective bargaining agreement for full-time Information Specialists were controlling as to the position of part-time Information Specialist, and whether RTD was prohibited from creating the position of part-time Information Specialist during the term of the existing agreement unless the Union voluntarily agreed to "mid-term" bargaining; or whether the 2006 addition to the collective bargaining agreement of RTD's "right to create positions" empowered RTD to create the position mid-term, and whether the parties were then to negotiate and, if necessary, arbitrate the wages, terms and conditions of such positions. Complaint Attachment A at 3-14.

11. Arbitrator Redwood denied the Union's grievance, holding that "The Union did not meet its burden or onus of establishing that the action of the District was not permitted by the contract." Complaint Attachment A at 14. Arbitrator Redwood found that Article I, Section 5 of the collective bargaining agreement, "particularly given the 2006 addition" to the agreement of "right to create positions" language, gave RTD the right to create the position at issue during the term of the existing agreement. Complaint Attachment A at 9-11. Arbitrator Redwood added that the position could not be implemented until the parties negotiated the working conditions, benefits and wages of the position, as well as other "germane issues of importance and genuine

concern to the Union arising out of the position creation …" *Id* at 11. "The outcomes of these negotiations could include Union acquiescence, agreement between the parties, and failing that, arbitration over the proposed working conditions by the parties." *Id*. "[F]ailing agreement in negotiations, the District can proceed with implementation of the position, pending arbitration." *Id*.

12. Arbitrator Redwood considered and rejected the Union's claim that it had a right not to engage in mid-term negotiations, and thus effectively prevent RTD from creating positions mid-term. Arbitrator Redwood noted:

> At the extreme a blanket refusal by the Union to discuss or negotiate matters mid-term would ***totally negate the right of management to do what it is authorized to do*** mid-term. Where management has the right to create positions at any time, to change staff levels and manning, during the life of the contract, ***as authorized by the contract***, some such changes, as here, will require negotiation by the parties.

Complaint Attachment A at 12 (emphasis added).

13. In his award Arbitrator Redwood expressly addressed the contract provisions attached to the Union's Complaint. *Compare* Complaint Attachment B (Article V – Clerical Employees) *with* Complaint Attachment A at 5, 7-8, 10-11 (discussion of Article V by Arbitrator Redwood).

14. The sole statutory basis cited by the Union for vacating the award is C.R.S. § 13-22-223(1)(d) of the CUAA, which provides for an award to be vacated where the arbitrator "exceeded the arbitrator's powers …" *See* Complaint p. 5, ¶ 14.

15. The sole contractual proscription on arbitral power that the Union alleges the arbitrator to have violated is Article I, Section 10(g) of the parties' collective bargaining agreement, which states in relevant part: "The arbitrator shall have no power to add to, subtract

from, or modify the provisions of this Agreement." *See* Complaint at 4, ¶ 11.

16. Arbitrator Redwood expressly recognized the limits of his authority at Article I, Section 10(g), at the very outset of his detailed, six-page analysis:

> "This has been a difficult case to decide … The difficulty stems from the lack of explicit language relating to the particular issue before us and the lack of clarification in some instances as to the meaning of certain terms and of the intent of the parties. ***Article I, Section 10(g) of the Agreement states that 'the Arbitrator shall have no power to add to, subtract from, or modify the provisions of the Agreement,'*** and hence this decision is based first and foremost on what the Agreement does say, and where there is uncertainty in this regard, on the evidence of what the intent of the parties was in formulating the wording of the contract."

Complaint Attachment A at 8 (emphasis added).

III. ARGUMENT

A. The Complaint Fails to State a Claim

17. Whether a complaint fails to state a claim must be determined solely from the matters stated within the four corners of the complaint. *E.g., Kratzer v. Colo. Intergovernmental Risk Share Agency*, 18 P.3d 766, 769 (Colo. App. 2000). However, when a document is referenced by name in a complaint, let alone formally incorporated by reference or attached to the complaint as the Union has done with Arbitrator Redwood's award, it is not considered a matter outside the pleadings and may be considered for purposes of a motion to dismiss for failure to state a claim without requiring conversion of the motion to one for summary judgment. *Walker v. Van Laningham*, 148 P.3d 391, 397 (Colo. App. 2006); *Yadon v. Lowry*, 126 P.3d 332, 335-36 (Colo. App. 2005).

18. Motions to dismiss for failure to state a claim are disfavored, but may be granted where it clearly appears that the plaintiff would not be entitled to any relief under the facts

pleaded. *Nat'l Sur. Corp. v. Citizens State Bank*, 41 Colo. App. 580, 581, 593 P.2d 362, 364 (Colo. App. 1978), *aff'd*, 199 Colo. 497, 612 P.2d 70 (Colo. 1980). In this case the facts pleaded include Arbitrator Redwood's award. *See* Complaint at 4, ¶ 12; *see also* Complaint at 5, ¶ 13 (further incorporating Arbitrator Redwood's award into the claim for relief).

19. A CUAA application to vacate an arbitration award is a special statutory proceeding. *BFN-Greeley, supra*, 141 P.3d at 941. The CUAA "sets out in precise detail the rules that apply to confirmation of arbitration awards and the methods by which parties may request courts to vacate or modify such awards." *Id*. An application to vacate an arbitration award "must be made by motion to the court and heard in the manner provided by law or court rule for making and hearing motions." C.R.S. § 13-22-205(1). Testimony or documents from the arbitrator are barred in this case, since the Union is not claiming corruption, fraud, or misconduct. C.R.S. § 13-22-214(4)(a).

20. "To facilitate confidence in the finality of arbitration awards and discourage piecemeal litigation, the statute strictly limits the role of the courts in reviewing awards, and a party challenging an award bears a heavy burden." *BFN-Greeley, supra,* 141 P.3d at 940. "An arbitration award is tantamount to a judgment and is entitled to be given such status by the court which reviews it. … Thus, when a party attacks the validity of an arbitration award, he bears the burden of sustaining the attack." *Container Technology Corp. v. J. Gadsden Pty., Ltd*., 781 P.2d 119, 121 (Colo. App. 1989).

21. In resolving a request to vacate an arbitration award, the issue before the Court is strictly limited to whether a reason to vacate the decision is established under the provisions of the CUAA. *Giraldi, supra*, 892 P.2d at 423. "[W]here the parties empower an arbitrator to

resolve an issue, courts may not review the merits – including issues of contract interpretation – of the arbitration decision." *Treadwell v. Village Homes of Colorado, Inc*., 222 P.3d 398, 400 (Colo. App. 2009).[2]

22. One of the grounds for vacating an arbitration award is if the arbitrator "exceeded the arbitrator's powers." C.R.S. § 13-22-223(1)(c). The legal standard under the CUAA for determining that an arbitrator exceeded his powers is difficult to meet. "It is not sufficient under this standard to argue merely that the arbitrator committed an error of law on the merits. … Rather, plaintiff must establish that the arbitrator exceeded the powers granted in the agreement by ***refusing to apply*** or ***ignoring*** the legal standard agreed upon by the parties for resolution of the dispute." *Giraldi, supra*, 892 P.2d at 424 (emphasis added). *See also Coors Brewing Co. v. Cabo*, 114 P.3d 60, 64 (Colo. App. 2004).[3] The Union does not claim in this proceeding that the arbitrator refused to apply the above legal standard in resolving the dispute. *Cf. Giraldi, supra*,

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[2] A Colorado federal district court very recently applying the CUAA has likewise emphasized the very heavy burden that must be overcome to vacate an arbitral award: "[J]udicial review of an arbitrator's award is 'among the narrowest known to the law.' 'It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different than his.' Thus '[w]hether the arbitrator's reading of the agreement was strained or even seriously flawed ... is irrelevant.' As a result, judicial review of an arbitration award is extremely limited: 'The arbitrator's factual findings are beyond review, and, so long as the arbitrator does not ignore the plain language of the [collective bargaining agreement], so is his interpretation of the contract.' " *Catholic Health Initiatives of Colo. v. Communications Workers of America*, Slip Copy, 2010 WL 1348290 (D. Colo., March 31, 2010) (internal citations omitted).

[3] "[A]n arbitrator can exceed such power only when the award goes beyond the scope of the arbitration agreement. This interpretation is consistent with earlier Colorado appellate decisions which indicate that an arbitrator exceeds his powers 'where "a portion of an arbitration award ... goes beyond the matters submitted to the arbitrator for resolution." ' [Citations omitted.] *Coors Brewing, supra,* 114 P.3d at 64.

892 P.2d at 424; *Magenis v. Bruner*, 187 P.3d 1222, 1225-26 (Colo. App. 2008) (decision vacated for exceeding powers where agreement clearly required arbitrator to award reasonable attorney fees to prevailing party yet arbitrator expressly "declined" to do so). Rather, the Union claims that the arbitrator's decision "ignores and conflicts with the express language of the bargaining agreement." Complaint at 5, ¶ 16.

23. The question of whether the arbitrator exceeded his or her powers is fundamentally different from whether the arbitrator correctly interpreted the collective bargaining agreement, correctly determined the facts, or correctly applied the law. As very recently re-emphasized by the Colorado Court of Appeals in *Treadwell, supra,* 222 P.3d at 400-01 (emphasis added):

> [W]here "an arbitrator resolves disputes regarding the application of a contract, and no dishonesty is alleged, the arbitrator's improvident, even silly, factfinding does not provide a basis for a reviewing court to refuse to enforce the award." *Major League Baseball Players Ass'n v. Garvey,* 532 U.S. 504, 509, 121 S.Ct. 1724, 149 L.Ed.2d 740 (2001) (internal quotations omitted).
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> Courts "may decline to confirm an arbitration award only in limited circumstances." *Barrett* [*v. Investment Mgmt. Consultants, Ltd.,* 190 P.3d 800, 802 (Colo. App. 2008).] These limited circumstances, listed in section 13-22-223(1), do not include the merits of the award. Rather, they involve "specific instances of outrageous [arbitral] conduct" and "egregious departures from the parties' agreed-upon arbitration." *See Hall Street Associates, L.L.C. v. Mattel, Inc.,* 552 U.S. 576, ----, 128 S.Ct. 1396, 1404, 170 L.Ed.2d 254 (2008) (construing similar provisions of the Federal Arbitration Act (FAA), 9 U.S.C. §§ 9-11). The deference to arbitrators is so great, *see Barrett,* 190 P.3d at 802, that referring to judicial review of arbitral awards may be something of a misnomer. *See Wise v. Wachovia Securities, LLC,* 450 F.3d 265, 269 (7th Cir.2006) (Posner, J.).
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> The line between the unreviewable merits of arbitral awards and the enforceable limits upon arbitrators' powers is most easily blurred where arbitrators must interpret and apply contractual language. ***Because parties do not empower arbitrators to misconstrue contracts, losing parties could always claim the arbitrators exceeded their powers by failing to follow the contractual preconditions to the challenged awards***.

24. The sentence in bold italics immediately above describes exactly what the Union

is attempting to do in this case. The Union claims that the arbitrator "exceeded his powers" because "the decision of Arbitrator Redwood ignores and conflicts with the express language of the collective bargaining agreement." Specifically, the Union argues that the arbitrator ignored the part of the collective bargaining agreement which specifies that "The arbitrator shall have no power to add to, subtract from, or modify the provisions of this Agreement." *See* Complaint p. 4, ¶ 11 (quoting above article and section); Complaint p. 5, ¶15 (citing above article and section in claim for relief) (emphasis added). However, the Union's Complaint elsewhere demonstrates on its face, in the text of Arbitrator Redwood's award, that Arbitrator Redwood did not "ignore" the contract's restrictions on his powers. Instead, he expressly recognized and honored them in reaching a decision that he was expressly empowered by the parties to make: whether RTD exceeded its authority under the collective bargaining agreement when it implemented the part-time Information Specialist position. The Complaint demonstrates, again on its face, that Arbitrator Redwood carefully considered all relevant provisions of the parties' collective bargaining agreement and simply arrived at a decision on the merits that the Union disagrees with: namely, that particularly given the 2006 addition of language to the parties' collective bargaining agreement confirming RTD's right to create positions, RTD had the right to do so during the term of the contract.[4]

25. Ironically, one of the reasons Arbitrator Redwood ruled the way he did was that, if he had ruled in favor of the Union, the effect of such a ruling could have been to ***subtract*** from

[4] Any argument that Arbitrator Redwood was "going beyond the contract terms and, in effect, enacting new binding terms and conditions of employment" fundamentally misreads the arbitrator's decision. *City and County of Denver v. Denver Firefighters Local No. 858*, 663 P.2d 1032, 1039 (Colo. 1983) (dicta). Arbitrator Redwood ruled that RTD had the right to create the disputed position mid-term. He did not impose or even address the wages and terms of the new position. *See* Complaint Attachment A at 12-14.

the provisions of the parties' collective bargaining agreement: i.e., to "totally negate the right of management to do what it is authorized to do" under the contract. Complaint Attachment A at 12. As Arbitrator Redwood noted, the Union's argument "may have had validity prior to 2006, though arguable, but it is now superceded [*sic*] by the clear language added to Article I, Section 5, in the 2006-2009 Agreement." Complaint Attachment A at 13. The Union is thus plainly attempting to bootstrap what should be a narrowly circumscribed, separate and preliminary issue – whether the arbitrator exceeded his powers – into a demand that the Court engage in extensive, freewheeling second-guessing of the merits of Arbitrator Redwood's entire decision.

26. In summary, the Union's sole claim in this proceeding is that the arbitrator exceeded his powers. That claim is in turn solely based on the collective bargaining agreement's provision that the arbitrator has no power to add to, subtract from, or modify the provisions of this Agreement. Under *Giraldi*, 892 P.2d at 424, a claim that an arbitrator has exceeded his or her powers requires a showing that the arbitrator either refused to apply or ignored the legal standard setting forth the arbitrator's powers. Mere assertions that an arbitrator incorrectly interpreted the contract fail to state a claim under the CUAA. *Cf. Treadwell, supra*, 222 P.3d at 401. Specific instances of "outrageous" arbitral conduct and "egregious" decisions must be shown. *Id*. Arbitrator Redwood's decision is part of the Complaint and demonstrates on its face that he did not ignore or refuse to apply the contract's restrictions on his powers, and did not act in an outrageous or egregious manner. Instead, the Complaint shows that Arbitrator Redwood carefully and expressly honored the parties' stipulated issue and their collective bargaining agreement's limits on his authority. The Complaint therefore fails to state a claim.

For the above reasons, RTD respectfully requests that the Court (1) dismiss the

Complaint for failure to state a claim; (2) confirm the arbitration award as required by C.R.S. § 13-22-223(4) whenever an award is not vacated; (3) enter a judgment in conformity therewith as required by C.R.S. § 13-22-225(1); and (4) award RTD its reasonable costs under C.R.S. § 13-22-225(2). In addition, assuming that the Court confirms the arbitration award, RTD also hereby respectfully applies for and requests its reasonable attorney fees and other reasonable expenses of litigation as authorized by C.R.S. § 13-22-225(3); RTD is prepared to submit a bill of costs for same upon the Court's direction. Finally, RTD requests that the Court grant RTD all other relief to which it may be entitled.

DATED this 25th day of May, 2010.

Respectfully submitted,

REGIONAL TRANSPORTATION DISTRICT

This pleading is filed electronically pursuant to C.R.C.P. 121, § 1-26. The original signed pleading is in counsel's file.

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a copy of the foregoing **MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM** was [ ] hand delivered, or [x] e-served by LexisNexis, or [ ] served by facsimile to _____,or [ ] sent by United States mail postage prepaid, to the following on this 25th day of May, 2010:

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