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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DEFENDANT RTD'S REPLY BRIEF IN SUPPORT OF 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, submits this reply brief in support of its C.R.C.P. 12(b)(5) motion to dismiss the Complaint of Amalgamated Transit Union Local 1001 (the "Union") for failure to state a claim.

I. ARGUMENT

RTD has moved to dismiss the complaint for failure to state a claim because the Union's claim is permitted by the Colorado Uniform Arbitration Act ("CUAA") , C.R.S. § 13-22-201 *et seq*., only where an arbitrator is "refusing to apply or ignoring" agreed restrictions on his powers. *Giraldi v. Morrell*, 892 P.2d 422, 424 (Colo. App. 1994). The Union's Complaint proves, on its face, that the arbitrator did not refuse to apply or ignore the collective bargaining agreement's restrictions on his powers but instead carefully considered and honored them. Taken as a whole, therefore, the Complaint fails to state a valid claim.

In its responsive brief, the Union does not even address the Colorado Court of Appeals' *Giraldi* opinion, even though that case is the dispositive centerpiece of RTD's motion. Instead, the Union mistakenly asserts that Arbitrator Redwood "imposed" some sort of "remedy" of specific wage rates and working conditions. *See* Response at 2-6. Respectfully, the Union has fundamentally misunderstood the scope of the arbitrator's decision.

In truth, Arbitrator Redwood "imposed" absolutely nothing. He awarded no "remedy": this grievance was brought by the Union, and the Union lost, so discussing the arbitrator's decision in terms of a "remedy" is illogical.[1] Arbitrator Redwood's opinion is devoid of any language even discussing the merits of the wage rate and other benefits applicable to the position. The *stipulated issue* for Arbitrator Redwood was simply whether RTD had violated the collective bargaining agreement by implementing the position mid-term. Arbitrator Redwood scrupulously honored the extent of the powers granted to him, and did no more than to decide the

[1] The arbitrator would only have been authorized by the parties to provide a remedy if the Union had won the arbitration: "ISSUE: 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 (emphasis added).

very issue that the parties had mutually empowered him to decide.

Arbitrator Redwood even made it crystal clear that he was *not* himself ruling on – let alone "imposing" or "awarding," as the Union charges – the appropriate wages and working conditions for the position. *See* Complaint Attachment A at 11-12. To the contrary, he expressly noted in his opinion that the wages, working conditions and other "germane issues of importance and genuine concern to the Union arising out of the position creation" could not be finalized until the parties negotiated them. *Id*. at 11. That being said, RTD's contractual right to create a position could also not be held hostage to the Union's stubborn and outright refusal to negotiate during the term of a contract, because to do so would "totally negate" – in other words, it would *ignore* – language in the collective bargaining agreement that the parties had added in 2006 for the purpose of giving RTD the right to create positions mid-term. *Id*. at 12.

It is ironic that the Union is claiming that Arbitrator Redwood's decision should be overturned because it allegedly contradicts certain language of the collective bargaining agreement, in violation of restrictions on the arbitrator's powers set forth at Article I, Section 10(g) of the parties' collective bargaining agreement. Had Arbitrator Redwood ruled the way the *Union* wanted, such a ruling would have "totally negate[d]" language in the collective bargaining agreement that RTD had only recently won through negotiation. *Id*. p. 12. Arbitrator Redwood obviously recognized this concern, and that is why he commenced his analysis by noting:

> Article I, Section 10(g) of the [collective bargaining] Agreement states that 'the Arbitrator shall have no power to add to, subtract from, or modify the provisions of this 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.

The Union weakly responds that, well, "simply because the arbitrator recites the limitations on his powers in his decision, does not mean that he did not *de facto* ignore them in issuing his award." Response at 2. However, Arbitrator Redwood did *not* "simply … recite[] the limitations on his powers." As anyone can plainly read in the Union's own Complaint, he discussed the limitations on his powers, provided a detailed and understandable explanation for his decision, and even expressly cited and discussed the very underlying contractual provisions that the Union now unfairly and illogically claims he "ignored." Complaint Attachment A at 5, 7-8, 10-11.[2]

As noted above, Arbitrator Redwood *was not tasked with, and did not decide*, the proper wages and working conditions for the position that he determined RTD had the right to create mid-term. Instead, having found that RTD did not violate the contract in creating the position, Arbitrator Redwood went on to note that if and when the Union finally agrees to negotiate, "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*. He also noted that due to the contract language negotiated in 2006 between the parties and in keeping with prior arbitral precedent between these parties, "[F]ailing agreement in negotiations,

[2] The Union's argument is rendered even weaker by its candid acknowledgement, in footnote 1 at page 5 of its Response, that "there is a federal circuit split on how the standard clause limiting [an]arbitrator's ability to modify, add or subtract from a contract limits an arbitrator's power." It is this "standard clause" – one that the Ninth Circuit Court of Appeals holds does not even place any additional limits on the arbitrator's power – upon which the Union is basing this entire CUAA lawsuit. In other words, the Union is claiming that the arbitrator exceeded his powers by violating a "standard clause" in collective bargaining agreements that at least in the Ninth Circuit does not even carry any independent weight at all.

the District can proceed with implementation of the position, pending arbitration." *Id*.[3]

As of today's date, due to the Union's intransigence there still has been no negotiation over the wages, working conditions, and other matters relevant to the position. The Union has instead filed this meritless action that flies in the face of *Giraldi* and the CUAA.

The Union's Response is basically nothing more than an argument, citing a passel of federal-court cases from circuits other than Colorado's, against a position that Arbitrator Redwood did not even take in the first place. *See* Response at 4-5. By contrast, Colorado law on the CUAA is clear: "where 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). As the dispositive and controlling *Giraldi* opinion makes even more clear, in determining whether an arbitrator exceeded his powers,

> [i]t is not sufficient … 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, 892 P.2d at 424 (emphasis added); *see also Coors Brewing Co. v. Cabo*, 114 P.3d 60, 64 (Colo. App. 2004) (arbitrator exceeds power only when award goes beyond scope of arbitration agreement).

It is telling that the Union in its Response barely even discusses the CUAA itself, and it is virtually a confession by the Union of the merits of RTD's motion that the Union utterly ignores

[3] The Union does not claim in its Complaint that Arbitrator Redwood erred in ruling that RTD as the employer could implement its offer when the parties reached impasse in negotiations, and that the CUAA authorizes the decision to be vacated based on any such error. The concept of unilateral implementation of an employer's last offer upon impasse is in fact a black-letter labor-law principle. *See, e.g.,* C. Loughran, *Negotiating a Labor Contract* (BNA 3d ed. 2003) at 407.

the key, controlling Colorado Court of Appeals opinion at the heart of RTD's motion: *Giraldi.*

II. CONCLUSION

In filing this action, the Union has engaged in exactly the type of second-guessing over the merits of an arbitrator's decision that the CUAA was created to avoid. It is clear from the Union's Complaint that Arbitrator Redwood did in fact respect and apply the limits on his powers; he did not refuse to apply or ignore them. Instead, it is the Union that has ignored the primary and controlling Colorado case on point. Because the arbitrator's decision was attached and incorporated into the Complaint, and given the evidentiary restrictions in the CUAA prohibiting inquiry into the arbitrator's state of mind, there is no reason why this case cannot be decided at this time, and it is entirely appropriate for disposition by way of dismissal for failure to state a claim.[4]

RTD therefore respectfully renews its requests, as set forth in its motion, 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 has already applied 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

[4] The Union even went so far in its Complaint as to demand that Arbitrator Redwood not even be given the opportunity to reconsider his own opinion upon rehearing, *see* Complaint at 5 – even though the very section of the CUAA cited by the Union in support of its demand authorizes replacement of the arbitrator only in limited circumstances generally involving arbitrator misconduct, and even though the Union alleged no such circumstances. *See* C.R.S. § 13-22-223(3). This is one reason why RTD believes that an award of reasonable attorney fees is appropriate in this instance.

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 June, 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 **REPLY BRIEF IN SUPPORT OF RTD'S 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 June, 2010:

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