

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION**

CAPE FEAR PUBLIC TRANSPORTATION AUTHORITY,)	
)	
Plaintiff,)	
)	
v.)	File No. 7:11-cv-00046-BO
)	
AMALGAMATED TRANSIT UNION LOCAL UNION 1328,)	
)	
Defendant.)	
)	

**DEFENDANT’S MEMORANDUM OF LAW IN SUPPORT OF ITS
MOTION TO DISMISS PLAINTIFF’S CLAIM AND FOR ATTORNEYS’ FEES**

Defendant Amalgamated Transit Union Local Union 1328 (“ATU Local 1328” or the “Union”), respectfully submits this memorandum of law in support of its motion to dismiss the claim filed by plaintiff Cape Fear Public Transportation Authority (“CFPTA”) on several grounds pursuant to Federal Rule of Civil Procedure 12(b) and for attorneys’ fees. First, plaintiff’s claim should be dismissed for lack of personal jurisdiction, insufficient process, and insufficient service of process pursuant to Rule 12(b)(2), (4), and (5) because plaintiff has failed to properly serve a complaint and summons upon defendant. Second, plaintiff’s claim should be dismissed for lack of subject matter jurisdiction and failure to state a cognizable claim under 28 U.S.C. § 185 pursuant to Rule 12(b)(1) and (6) because plaintiff CFPTA was not a party to the arbitration decision that it seeks to vacate, and thus has no standing to challenge the decision. Finally, plaintiff has, in any event, failed to state a valid claim to vacate the arbitration decision pursuant to Rule 12(b)(6) because the arbitrator correctly determined that Professional Transit Management of Wilmington, Inc. (“PTM”) violated the controlling collective bargain agreement

in terminating the grievant, and her decision to reinstate the grievant does not violate any clearly established public policy. In addition, the Court should award defendant its reasonable attorneys' fees incurred in this litigation because plaintiff's motion to vacate the arbitration award has no arguable basis in the law.

PROCEDURAL HISTORY

The arbitration decision at issue here arose out of a grievance filed by ATU Local 1328 against PTM regarding the termination of PTM employee and ATU Local 1328 bargaining unit member Marion Davis. Grievances and arbitrations are governed by the collective bargaining agreement ("CBA") between ATU Local 1328 and PTM. The CBA in force was originally contracted between ATU Local 1328 and PTM's predecessor, First Transit, Inc. ("First Transit"), and was effective from July 1, 2007, through June 30, 2010. (Pl.'s "Joint Exhibit 1," Memorandum of Agreement Between First Transit and ATU Local 1328, ECF Doc. #1-3, pp. 27-52.) PTM subsequently replaced First Transit as the management company for the Wilmington bus system, and has succeeded First Transit as the party to the CBA. Plaintiff CFPTA is not a party to the CBA. (*Id.*)

Davis was terminated from her employment on December 3, 2009, for failing an alcohol test. (Pl. Ex. B, Arbitrator Opinion and Award, ECF Doc. #1-2, p. 14.) The Union filed a grievance protesting the termination, which was not resolved with PTM, and thus proceeded to arbitration. (*Id.*) Arbitrator Charlotte Gold held a hearing on October 15, 2010, in which the Union and PTM were the only participants. (*Id.* at 13.) Plaintiff CFPTA was in no way involved with the arbitration.

On November 14, 2010, the arbitrator issued an Opinion and Award in favor of the Union. Because PTM and the Union had agreed to a drug and alcohol policy that was

incorporated into the CBA, and the policy explicitly mandated reinstatement of first-time offenders following rehabilitation, the arbitrator sustained the grievance. (*Id.* at 20-21.) Accordingly, the arbitrator ordered that the grievant be reinstated with back pay from October 14, 2010, the date on which her commercial driver's license was reinstated. (*Id.* at 22.)

On February 11, 2011, plaintiff initiated this case under Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, by filing its Motion to Vacate or Modify Arbitration Award, along with exhibits and a memorandum of law. Plaintiff did not file a complaint or other pleading. Nor did plaintiff obtain a summons from the Court. According to the Affidavit of Service filed by plaintiff on March 11, 2011, plaintiff purportedly served its motion and accompanying documents by mailing them to Gary Rauen, International Vice President for the Amalgamated Transit Union ("ATU"), at his office in Washington D.C., on February 11, 2011. (ECF Doc. #4.) Mr. Rauen is an employee of the ATU, a national labor union, which is a separate and distinct organization from ATU Local Union 1328, the local union defendant here. To date, plaintiff has never served a summons or complaint in this case.

ARGUMENT

I. Plaintiff's Claim Should be Dismissed Pursuant to Rule 12(b)(2), (4), and (5) Because Plaintiff has Failed to Serve a Complaint and Summons Upon Defendant.

A plaintiff bears the burden of showing that the service of process, and the process itself, complies with the requirements set forth in Rule 4 of the Federal Rules of Civil Procedure. *Elkins v. Broome*, 213 F.R.D. 273, 275 (M.D.N.C. 2003). Rule 4(a) sets forth the requirements for a properly completed summons. Fed. R. Civ. P. 4(a). Rule 4(b) provides that a plaintiff must present a properly completed summons for each defendant in an action to the clerk, who will then sign, seal, and issue the summonses to plaintiff for service upon each defendant. *Id.* § 4(b).

The remainder of Rule 4 specifies how service is to be effected. *Id.* §§ 4(c)-(k). The Fourth Circuit has noted that “the rules are there to be followed, and plain requirements for the means of effecting service of process may not be ignored.” *Armco, Inc. v. Penrod-Staufffer Bldg. Sys., Inc.*, 733 F.2d 1087, 1089 (4th Cir. 1984). Moreover, “[a]bsent waiver or consent, a failure to obtain proper service on the defendant deprives the court of personal jurisdiction over the defendant.” *Koehler v. Dodwell*, 152 F.3d 304, 306 (4th Cir. 1998).

Plaintiff apparently believes that initiation of a claim to vacate an arbitration award brought under Section 301 of the LMRA need not comply with Rule 4. The Supreme Court, however, has held that for a suit filed under Section 301, “Rule 3 of the Federal Rules of Civil Procedure provides that a civil action is commenced by filing a complaint with the court, and Rule 4 governs the procedure for effecting service and the period within which service must be made.” *West v. Conrail*, 481 U.S. 35, 38 (1987). Similarly, the Fourth Circuit has held that a suit pursuant to Section 301 requires proper service under Rule 4, and that failure to effect such service results in dismissal of the suit. *Central Operating Co. v. Utility Workers of America*, 491 F.2d 245, 251 (4th Cir. 1974). Finally, the Federal Rules of Civil Procedure make clear that there is no exception to Rule 4 for suits under Section 301. *See* Fed. R. Civ. P. 81(a)(6) (listing statutory exceptions inapplicable here).

In this case, plaintiff has never served a summons or otherwise complied with Rule 4. Nor has plaintiff taken steps to comply with Rule 4 since being alerted to its failing by defendant’s motion for extension of time filed on May 26, 2011. Plaintiff’s lack of service thus leaves this Court without personal jurisdiction over defendant, and defendant’s claims should be dismissed for failure to properly serve process.

In earlier filings, plaintiff has asserted that it effected service pursuant to Rule 5. But plaintiff was required to effect service under Rule 4 to commence its action, so whether it complied with Rule 5 in serving its motion is irrelevant. Nonetheless, plaintiff did not even properly serve its motion under Rule 5 because it did not serve the actual defendant in this case.

Rule 5 only permits service upon the actual party, the party's attorney, or by means consented to in writing. Fed. R. Civ. P. 5(b). Plaintiff contends that it served its motion under Rule 5 by serving it on Gary Rauen by mail. Such service is plainly inadequate for several reasons. First, Rauen is not the defendant in this action; the defendant is ATU Local 1328. Second, Rauen is not even an employee of defendant. Rather, he is an employee of the Amalgamated Transit Union, a national labor union, which is a separate and distinct organization from ATU Local 1328, the local union defendant and proper party in this case. Defendant ATU Local Union 1328 was the party to the arbitration case at issue here, not the national ATU. Defendant ATU Local Union 1328 is also the party to the underlying collective bargaining agreement, not the national ATU, and thus it must be the party served.

Third, Rauen is not an attorney and has never been defendant's attorney, and defendant has not otherwise consented to Rauen accepting service on its behalf in this case. Defendant was not represented by an attorney in this matter until it retained the undersigned on May 25, 2011. It is immaterial that Rauen helped to present ATU Local 1328's case before the arbitrator in the arbitration hearing at issue here. Plaintiff has not served its motion on either defendant or defendant's attorney, or by other permissible means, and thus has clearly not complied with Rule 5. See Fed. R. Civ. P. 5(b); *Rivera v. M/T Fossarina*, 840 F.2d 152, 155 (1st. Cir. 1988); *Timmons v. United States*, 194 F.2d 357, 360 (4th Cir. 1952) ("In view of the important consequences that flow from the service of pleadings and other papers, the courts, quite rightly,

have required the strictest and most exacting compliance with the rule when service is made by mail”).

Because plaintiff did not effect proper service under Rule 4, without any good cause for its failure to do so, defendant’s claims should be dismissed for failure to properly serve process and for lack of personal jurisdiction, and defendant should be reimbursed for having to defend claims that were improperly brought against it.

II. Plaintiff’s Claim Should be Dismissed Pursuant to Rule 12(b)(1) and (6) Because Plaintiff Was Not a Party to the Arbitration Decision That it Seeks to Vacate.

The existence of subject matter jurisdiction is a threshold question that a federal court must address before considering the merits of the case. *Jones v. Am. Postal Workers Union*, 192 F.3d 417, 422 (4th Cir. 1999). Pursuant to Rule 12(b)(1), a claim may be dismissed for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). When confronted with a Rule 12(b)(1) motion to dismiss, the plaintiff, as the party opposing the motion, has the burden of proving that subject matter jurisdiction does in fact exist. *Richmond, Fredericksburg & Potomac R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991).

“Standing is a threshold jurisdictional question which ensures that a suit is a case or controversy appropriate for the exercise of the courts’ judicial powers under the Constitution of the United States.” *Pye v. United States*, 269 F.3d 459, 466 (4th Cir. 2001). If a plaintiff lacks standing, its claim must be dismissed for lack of subject matter jurisdiction. *See White Tail Park, Inc. v. Stroube*, 413 F.3d 451, 459 (4th Cir. 2005). In this case, plaintiff CFPTA lacks standing because it was not a party to the arbitration decision that it seeks to vacate.

Section 301 of the LMRA states: “Suits for violations of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be

brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.” 29 U.S.C. 185(a). “Section 301 authorizes federal courts to hear suits for violations of contracts between an employer and a labor organization or between labor organizations.” *Jackson v. Kimel*, 992 F.2d 1318, 1325 (4th Cir. 1993).

Because Section 301 only provides a cause of action for breach of a collective bargaining agreement, suits under Section 301 must be between parties to the agreement, with only one recognized exception. *See Bryant v. Bell Atl. Md., Inc.*, 288 F.3d 124, 131 (4th Cir. 2002) (“An individual employee represented by a union, such as Bryant is, generally does not have standing to challenge, modify, or confirm an arbitration award because he was not a party to the arbitration.” (emphasis added)); *Int’l Union, United Mine Workers v. Covenant Coal Corp.*, 977 F.2d 895, 899 (4th Cir. 1992) (holding that company which was not a party to the collective bargaining agreement could not be sued under § 301); *Sine v. Local No. 992, Int’l Bhd. of Teamsters*, 730 F.2d 964, 966 (4th Cir. 1984) (holding that § 301 suit may only be brought against the parties to the contract). “The exception to this general rule is when the union has breached its duty of fair representation by failing to enforce the award on the employee’s behalf.” *Bryant*, 288 F.3d at 131. Therefore, a Section 301 suit to challenge an arbitration award must be brought by a party to the arbitration absent a breach of a duty of fair representation.

Analogously, only a party to an arbitration can challenge the arbitration decision under either the Federal Arbitration Act or the North Carolina Revised Uniform Arbitration Act. *See Psarianos v. Standard Marine*, 12 F.3d 461, 465 (5th Cir. 1994) (“The relevant provisions of the Federal Arbitration Act, 9 U.S.C. §§ 201-08 (1993), do not confer such standing on parties not participating in arbitration.); 9 U.S.C. § 10 (allowing “order vacating” an arbitration award

“upon application of any party to the arbitration” (emphasis added)); N.C. Gen. Stat. § 1-569.23 (permitting court to vacate arbitration award upon “motion to the court by a party to an arbitration proceeding” (emphasis added)).

In this case, plaintiff CFPTA was neither a party to the arbitration at issue nor to the underlying collective bargaining agreement. Plaintiff has not alleged that either ATU Local 1328 or PTM breached a duty of fair representation. Therefore, plaintiff lacks standing to challenge the arbitration decision here under Section 301. *See Bryant*, 288 F.3d at 131; *Local 13, Int’l Longshoremen’s and Warehousemen’s Union v. Pacific Maritime Assoc.*, 441 F.2d 1061, 1064 (9th Cir. 1971) (holding that because a local union was not a party to an arbitration, it could not challenge the arbitration decision under Section 301 or the Federal Arbitration Act).

In a footnote, plaintiff baldly asserts that it has standing because PTM acts as its agent. (Pl.’s Br. at 7, n. 3.) Plaintiff, however, failed to provide any authority for the proposition that a mere contractual relationship between two entities allows a non-party to challenge an arbitration decision or to file suit under Section 301 based on a collective bargaining agreement. Nor can it. North Carolina law prohibits state agencies from contracting with unions. N.C. Gen. Stat. § 95-98. Thus, it would be absurd to allow a public agency to file suit based on a breach of a contract with a union. Because plaintiff lacks standing, its claim must be dismissed for lack of subject matter jurisdiction and for failure to state a valid claim under Section 301.

III. Plaintiff’s Claim Should be Dismissed Pursuant to Rule 12(b)(6) Because the Arbitrator’s Decision was Correct and Did Not Violate Public Policy.

Under Rule 12(b)(6), a plaintiff’s complaint must be dismissed if it does not provide “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). For the reasons stated in Defendant’s Response to Plaintiff’s Motion

to Vacate or Modify Arbitration Award, filed this same day and incorporated by reference, the Court should conclude that the arbitrator in this case correctly determined that PTM violated the controlling CBA in terminating the grievant because PTM and the Union had agreed to a drug and alcohol policy that was incorporated into the CBA, and the policy explicitly mandated reinstatement of first-time offenders following rehabilitation. Moreover, the arbitrator's decision does not violate any clearly established public policy, but is instead fully consistent with federal and state regulation of transit drivers. Therefore, there are no grounds to vacate the arbitrator's opinion and award, and plaintiff has failed to state a valid claim under Section 301 of the LMRA.

IV. Defendant Should be Awarded its Attorneys' Fees for This Litigation Because Plaintiff's Motion has No Arguable Basis in the Law.

Under the LMRA, attorneys' fees may be awarded against a party whose challenge to an arbitrator's award was "pursued in the district court 'without justification.'" *United Food & Commercial Workers v. Marval Poultry Co.*, 876 F.2d 346, 350 (4th Cir. 1989). "Where a challenge goes to the fundamental issues of arbitrability or of whether an arbitration award 'draws its essence' from the contract, the standard for assessing its justification is indeed the relatively lenient one of whether it has 'any arguable basis in law.'" *Id.* at 351. "Where, however, the challenge goes not to issues of the fundamental power of an arbitrator to make an award but to the merits of an arbitrator's award as made, the standard of justification is much more stringent." *Id.* "Indeed, because such challenges, if undeterred, inevitably thwart the national labor policy favoring arbitration, they must be considered presumptively unjustified." *Id.* (emphasis added). The "critical distinction" is that the latter standard is applicable to "challenges to an arbitrator's award as made rather than to threshold arbitrability or to a total

departure from the labor contract's 'essence.'" *Id.* at 352. In this case, an award of attorneys' fees is necessary and proper under even the more lenient standard for several reasons.

First, as discussed in Section II, *supra*, plaintiff cannot challenge the arbitration decision below under Section 301 of the LMRA because it was not party to the arbitration or to the underlying CBA. In its motion to vacate, plaintiff cited no precedent to support its contention that it has standing in this case because there is no "arguable basis in the law" for such a position. This fundamental defect leaves plaintiff's suit "without justification." *See id.* at 351.

Second, as discussed in Defendant's Response to Plaintiff's Motion to Vacate or Modify Arbitration Award, plaintiff has no support for its position that the arbitrator's decision violates public policy in light of the Supreme Court's decision in *Eastern Associated Coal Corp. v. United Mine Workers of America*, 531 U.S. 57 (2000). Because there is no "explicit, well defined, and dominant" public policy that prohibits reinstatement of an employee who fails an alcohol test, the arbitrator's decision is not contrary to public policy. *See id.* at 65-67. Plaintiff relies on precedent that precedes *Eastern Associated Coal*, but there is "no arguable basis in the law" for its position following the Supreme Court's pronouncement.

Third, as discussed in Defendant's Response to Plaintiff's Motion to Vacate or Modify Arbitration Award, the arbitrator's decision unequivocally draws its essence from the controlling CBA because it precisely follows the plain language of Article 29 of the CBA and the 2009 Drug and Alcohol Policy incorporated by the CBA. At the very least, the arbitrator adopted an entirely reasonable interpretation of Article 29, and her interpretation cannot be disturbed under the governing standard of review. Plaintiff's position to the contrary has "no arguable basis in the law" and entitles defendant to attorneys' fees.

Finally, this Court should not overlook the important public policy supporting an award of attorneys' fees in this situation. The established law regarding the awarding of fees serves the worthy purpose of insuring that the parties' freedom of contract will be respected. It would ill serve this purpose to create an incentive for the losing side to challenge arbitration awards without a justifiable legal and factual basis for doing so. Likewise, it would ill serve the prompt and efficient determination of labor disputes to incentivize such unjustifiable challenges. An award of fees to the party who successfully defends an arbitration award is thus a necessary and appropriate element of the public policy underlying the law that the courts have established under the LMRA. Accordingly, this Court should award Defendant its attorneys' fees incurred in this litigation.

CONCLUSION

For the reasons stated above, and in Defendant's Response to Plaintiff's Motion to Vacate or Modify Arbitration Award, defendant respectfully requests that the Court enter an order granting the instant motion, dismissing plaintiff's claim, with prejudice, in its entirety, and awarding defendant its reasonable attorneys' fees incurred in this litigation.

Dated: June 24, 2011.

/s/ Narendra K. Ghosh

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Memorandum of Law in Support of its Motion to Dismiss to Plaintiff's Claim and for Attorneys' Fees was filed electronically with the Clerk of Court using the CM/ECF system which will send notification of such filing to George J. Oliver and Matthew Nis Leerberg, Attorneys for Plaintiff.

Dated: June 24, 2011.

/s/ Narendra K. Ghosh

Narendra K. Ghosh

NC Bar No. 37649