IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

PATRICK E. ARNOLD,

Plaintiff,

v. **CIVIL ACTION NO. 1:99CV75**
(Judge Keeley)

CABOT CORPORATION, GERALD MATHENY, AND RAYTHEON ENGINEERS & CONSTRUCTORS, INC.,

Defendants.

MEMORANDUM OPINION AND ORDER

Plaintiff, Patrick Arnold ["Arnold"], filed his motion for summary judgment on Count Two of his complaint on January 31, 2000 [Docket No. 48]. Defendants' filed a response brief on February 29, 2000 [Docket No. 51], and Arnold replied on March 10, 2000 [Docket No. 52].

Defendants, Cabot Corporation ["Cabot"], Gerald Matheny ["Matheny"], and Raytheon Engineers and Constructors, Inc. ["Raytheon"], filed their own motion for summary judgment as to all counts of the complaint on January 31, 2000 [Docket No. 47]. Arnold responded on February 29, 2000 [Docket No. 50], and defendants replied on March 10, 2000 [Docket No. 53].

In addition, Arnold filed a motion to remand the case to the Circuit Court of Pleasants County on March 17, 2000 [Docket No. 55], to

which defendants responded on March 31, 2000 [Docket No. 72]. Arnold filed his reply on April 11, 2000 [Docket NO. 73].

The Court heard oral argument on all three motions at the final pretrial conference held in this matter on April 20, 2000. Arnold appeared in person and through his counsel, Barbara Arnold. Eric Whytsell, counsel for all of the defendants, appeared in person with his client Matheny.

At the hearing, the Court found that it has original jurisdiction to hear this case and that it would need to refer to and interpret the collective bargaining agreement ["CBA"] in order to evaluate the merits of plaintiff's claims. Accordingly, the Court **DENIED** plaintiff's motion for summary judgment and **DENIED** plaintiff's motion to remand. The Court **GRANTED** defendants' motion for summary judgment for the reasons discussed more fully below.

FACTUAL BACKGROUND

This case was originally filed in the Circuit Court of Pleasants County on March 13, 1999. An amended complaint was filed on March 24, 1999. Defendant Raytheon removed the case to federal court on April 14, 1999, on the ground of federal

question jurisdiction, pursuant to § 301 of the Labor Management Relations Act ["LMRA"], 29 U.S.C. § 185. Co-defendants Cabot Corp. and Matheny filed notices of their consent to removal on April 16, 1999.

The determinative facts are undisputed. Arnold, a full-time Raytheon employee, performed work on the premises of Cabot's carbon black facility in Waverly, West Virginia from November 11, 1995 through to May 11, 1998. Raytheon provides maintenance, minor construction and renovation services at the Cabot facility, pursuant to an October 1995 agreement. Raytheon has approximately 23 employees drawn from different crafts working under the agreement. All of its employees are members of various trade unions that are signatories to the General Presidents' Project Maintenance Agreement. Arnold is a member of the Millwright Local Union No. 1755, United Brotherhood of Carpenters and Joiners. Cabot Corp. is not a signatory to the CBA, nor is Matheny, Cabot's reliability technician at the Waverly facility.

Apparently on April 24, 1998, Matheny advised Arnold that if he refused to perform work on his private property, then he

would not have a job the following Monday. Arnold did not do the requested work for Matheny. Defendants claim that Matheny was speaking in jest and never intended his comments to be taken seriously.

On May 7, 1998, Arnold was called out at midnight and worked until 3:18 a.m. on the morning of May 8, 1998. He was paid time and a half for four hours work.[1] Arnold did not report to work for his regular shift on May 8, 1998 but Dale Prim, Raytheon's site manager, credited plaintiff with four and a half hours work. Defendants characterize this payment as being made under Prim's discretionary authority. Arnold argues that, based on past practices, Raytheon should have paid him for a full eight hours.

On the next work day, Monday, May 11, 1998, Arnold appeared for work in jeans, T-shirt and tennis shoes. This was not his

[1] Although the parties refer to this as a "call out," the CBA refers to a call-in. The terms are used synonymously. "A call-in shall be defined as notification to report to work by whatever means to an employee outside of his regular shift or regularly scheduled day off or holiday. Call-ins as defined above shall be paid in accordance with one of the following categories: (a) . . . (b) When an employee is called in to work at or after the established starting time on Saturday, Sunday, scheduled day off or holidays, he shall be paid not less than four (4) hours at the applicable overtime rate for that day except when his call in is prior to or continuous with his normal work hours. . . ." The parties do not dispute that Arnold was paid in accordance with § XIX(2)(b).

normal work attire although some employees did come to work in "street clothes." He indicated to another employee, Mr. Smith, that he wished to speak to Dale Prim about Friday's pay. Shortly before a 7:00 a.m. safety meeting, Dale Prim asked Arnold to come to his office. Arnold and Prim discussed the additional payment Arnold believed he was entitled to for May 8, 1998, as well as his relationship with Matheny. As a result of the discussions, Arnold took a voluntary layoff. Arnold believes that he is also entitled to two hours pay for showing up and being ready to work on May 11, 1998. Dale Prim refused to give him two hours of "show up" or "reporting pay" because, in his opinion, plaintiff had not come to work intending to stay and work, given his attire and the nature of their conversation.

The parties agree that the collective bargaining agreement ["CBA"] discusses the "reporting pay" to which Arnold believes he is entitled for May 11, 2000. The parties also agree that the CBA does not mention the so-called "incentive pay" to which Arnold believes he is entitled even though he did not work his regular shift on May 8, 2000. Arnold alleges that Raytheon had an unwritten pattern and practice of giving extra compensation

as an incentive to get employees to come out to work at unusual hours. The extra compensation was paid in addition to payment, at a rate of time and a half, for actual hours worked. He alleges that he had been paid such incentive pay in the past and that defendants failed to abide by their established pattern and practice, thereby incurring liability under the Wage Act.

Defendants claim that although nothing in the CBA requires that employees be paid for hours not worked on the day after a callout, Raytheon employs a discretionary practice which, under its Site Manager, Dale Prim, sometimes allows Raytheon employees to report to work late or not at all on the day following a callout and to be paid as if they actually worked the entire shift that day. The decision regarding payment for hours not worked is based on a case-by-case consideration of various factors, including the nature and timing of the callout in question.[2]

[2] Cabot's plant manager, William Farr, testified that "Patrick Arnold did not show up the day after the callout but was paid for 7:00 to 11:30 a.m. This was based on the discretionary policy by using the judgment of Dale Prim, case by case, based on circumstances, the nature of the work, start and stop time, whether or not work was continuous from the previous shift, did the person get sleep, total duration of callout, and next day's work activities. Callout cards for two years prior to May 19, 1998 demonstrate that judgment is applied on a case by case basis." [Dckt 48, Ex. A at 29-30].

Arnold also contends that he is entitled to payment for two hours based on "show up" time under the CBA. Whether or not Arnold appeared at the work site "intending to work" at 7:00 a.m. on Monday, May 11, 1998, is a disputed question of fact. The CBA provides that:

> When an employee or new hire reports to work on any shift between the established hours of his/her regular work and is not given the opportunity to work because none was available and was not notified before the completion of the previous day's work, he/she shall be paid two (2) hours reporting time. . . . If an employee refuses to start or stops work on his/her volition, the minimum set forth herein shall not apply.

Article XIX, § 1.

In his complaint, Arnold alleges that in March and April of 1998, Matheny tried to force him to work on his private property in exchange for his continued employment at Cabot. Arnold further alleges that Dale Prim (Raytheon's site manager) forced him to take a voluntary layoff from his employment on May 11, 1998, even though work was available for him to perform. Count One of the Amended Complaint alleges that Matheny tortiously interfered with Arnold's employment contract by attempting to force him to work on his private property and then causing the termination of his employment contract with Raytheon when he refused to

do so. In Count Two of the Amended Complaint, Arnold alleges that he was not paid all wages due him, within 72 hours of his termination, as required by West Virginia's Wage Payment and Collection Act [Wage Act] and that he still has not been paid such wages.

LEGAL ISSUES PRESENTED

Arnold's complaint essentially raises three legal issues:

(1) Whether Cabot and Methany tortiously interfered with Arnold's employment contract with Raytheon, thereby causing him to be constructively discharged?
(2) Whether Arnold is entitled to a full eight hours of pay for May 8, 1998, even though he did not report work for his regular shift that day and he received four and a half hours worth of pay?
(3) Whether Arnold is entitled to two hours of reporting pay for May 11, 1998?

Before addressing the merits of Arnold's claims, the Court must first decide if it has original jurisdiction over this action. This is key because if Arnold has alleged purely state law claims and no interpretation of the CBA is required, then this Court lacks subject matter jurisdiction and the plaintiff's motion to remand should be granted.

Alternatively, if Arnold's state law claims are preempted and the case was properly removed to federal court, then any federal claims that he might have had are time-barred as Arnold

failed to grieve his claims through the grievance procedure set forth in the CBA. See Allis-Chalmers Corp. v. Leuck, 471 U.S. 202, 220 (1985) (permitting individuals to side-step available grievance procedures would cause arbitration to lose most of its effectiveness as well as eviscerate a central tenet of federal labor law that provides that arbitrators and not courts have the responsibility to interpret labor contracts in the first instance); Smith v. United Parcel Service, 902 F.Supp. 719, 722 (S.D.W.Va. 1995) (noting that it is well-settled that employees must exhaust their remedies under the CBA before seeking judicial relief).

Whether this Court has original jurisdiction hinges on whether the Court is required to consult and interpret the CBA in order to resolve the issues pending before it. See generally Lingle v. Norge Div. Of Magic Chef, Inc., 486 U.S. 399 (1988) (providing that state law is preempted by § 301 only if interpretation of a collective bargaining agreement is required); McCormick v. AT& T Technologies, Inc., 934 F.2d 531, 535 (4th Cir. 1991) ("Thus, the question of preemption analysis is not whether the source of a cause of action is state law, but

whether resolution of the cause of action requires interpretation of a collective bargaining agreement.")

Section 301 of the LMRA provides that:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, 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 not only provides federal courts with jurisdiction over employment disputes covered by collective bargaining agreements but also directs federal courts to fashion a body of federal common law to resolve such disputes. Allis-Chalmers v. Leuck, 471 U.S. 202, 209 (1985). The preemptive reach of § 301 encompasses state law claims that are directly based on the CBA and all those that are "substantially dependent upon analysis of the terms" of the CBA. Id. at 220. The Supreme Court has been vigilant in ensuring that federal labor law is not undermined by allowing parties to evade § 301 by mislabeling their contract claims as tortious breach of contract claims. Even though a state court may choose to define a tort as being

independent of any contract questions, Congress has mandated that federal law governs the meaning of contract terms in collective bargaining agreements. Id. at 218-19.

The Supreme Court has warned that, unless preemption is given effect, the federal right to decide who is to resolve a contract dispute will be lost. "If that occurs, claims involving vacation or overtime pay, work assignments, unfair discharge – in short, the whole range of disputes traditionally resolved through arbitration – could be brought in the first instance by a complaint in tort rather than contract." Id. at 219-20.

State law is thus preempted by § 301 in that only federal law, as fashioned by the courts under § 301, governs the interpretation and application of collective bargaining agreements. United Steelworkers v. Rawson, 495 U.S. 362 (1990). State law claims are also preempted where incompatible doctrines of local law conflict with principles of federal labor law. Local 174, Teamsters v. Lucas Flour, 369 U.S. 95, 102 (1962).

In Lingle v. Norge Div. Of Magic Chef Inc., 486 U.S. 399 (1988), the United States Supreme Court recognized that § 301 does not entirely displace state law in the labor relations

context. A State may provide substantive rights to workers when adjudication of those rights does not depend upon the interpretation of collective bargaining agreements. Id. Even if the CBA, on one hand, and state law, on the other, would require addressing precisely the same set of facts, as long as the state law claim can be resolved without interpreting the agreement itself, the claim is independent of the agreement for § 301 preemption purposes. Id. See also Antol v. Esposto, 100 F.3d 1111, 1117 (3rd Cir. 1997) ("Claims that are independent of a collective bargaining agreement, even if they are between employees and employers, are not removable.")

Arnold argues that no interpretation of the CBA is required and that the defendants have mandatory state law obligations regarding the prompt payment of wages to terminated employees that exist independently from the CBA and cannot be waived. Defendants argue that, prior to calculating the amount of wages due and owing, the Court must determine whether or not Arnold is entitled to the additional wages he seeks. In order to determine this, defendants argue, the Court must look to the CBA and to the "industrial common law" of the work site, and, consequently,

Arnold's claims are preempted by Section 301 of the Labor Management Relations Act ["LMRA"], 29 U.S.C. § 185.

ANALYSIS

1. Industrial Common Law

Interpretation of the collective bargaining agreement is not limited to the actual document itself, but includes the customs and practices of the "shop" or facility. The Fourth Circuit, in McCormick v. AT & T Technologies, Inc., stated that a CBA "is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate." 934 F.2d at 536. Furthermore,

> The specifics as to management conduct . . . need not be spelled out in all their detail and refinement for the collective bargaining agreement to be applicable. Rather, the collective bargaining agreement consists, in addition to its express provisions, of an "industrial common law -- the practices of the industry and the shop -- [which] is equally a part of the collective bargaining agreement although not expressed in it."

Id. at 536, citing United Steelworkers v. Warrior & Gulf, 363 U.S. 574, 581-82 (1960). See also Transportation-Communication Employees Union v. Union Pacific Railroad Co., 385 U.S. 157

(1967); Shiflett v. I.T.O. Corp., 202 F.3d 260, 2000 WL 142214 (4th Cir. 2000) (unpublished)[3] (discussing industrial common law). A CBA creates implied rights and duties, the contours of which are a matter of federal contract interpretation.

Therefore, if this Court is required to look beyond the four corners of the CBA and consider the customs and practices prevailing in the Cabot facility in Waverly, West Virginia, such customs and practices are also considered to be part of the CBA.

2. West Virginia Wage Collection and Payment Act Claims.

The United States Supreme Court has held that where a court merely needs to look to a CBA to compute damages owed for violations of a state wage law, § 301 does not preempt the state law claim. Livadas v. Bradshaw, 512 U.S. 107 (1994). Case law from across the country clearly establishes that there is no preemption of state wage payment and collection claims if no interpretation of the CBA is required. See e.g., Balcorta v. Twentieth Century Fox Film Corporation, __ F.3d __, 2000 WL

[3] Pursuant to Fourth Circuit Local Rule 36(c), which disfavors citation of unpublished opinions, a copy of this unpublished opinion is attached to this Order.

350562 (9th Cir. 2000) (finding no preemption where all that was required to determine that an employer had violated state law was "a clock or a calculator"); Stump v. Cyprus Kanawha Corp., 919 F.Supp. 221 (S.D.W.Va. 1995) (finding that state court, on remand, would need only to look at the National Bituminous Coal Wage Agreement in order to determine the amount of wages that were owed to the employees and that no interpretation of the agreement would be required); Ash v. Raven Metal Products, Inc., 437 S.E.2d 254 (W.Va. 1993) (holding that where no interpretation of CBA required, state wage claim was not preempted).

However, each of these cases is readily distinguishable from the second strand of wage payment cases that controls the case at bar. These cases involve situations in which courts must go beyond merely referring to wage scales in a CBA and are required to interpret the CBA to determine whether an employee is entitled to the wages he or she claims. For example, in Antol v. Esposto, 100 F.3d 1111 (3rd Cir. 1997), the plaintiffs were owed various sums for wages that they had earned while the company for which they worked was in bankruptcy. Plaintiffs brought suit

under the state wage act against various stockholders, owners and operators of their employer. On appeal the plaintiffs contended that their claims were independent of the CBA and that, once liability was established under state law, reference to the CBA for calculation of the damages would not trigger preemption. The appellate court found otherwise, holding that the state wage act did not create a right to compensation, but rather provided a statutory remedy when the employer breached its contractual obligation to pay earned wages. The contract between the parties governs in determining whether specific wages have been earned. Id. at 1117. See also Wheeler v. Graco Trucking Corp., 985 F.3d 108 (3rd Cir. 1993) (holding that employee's wage claim was preempted where claim was based squarely on the terms of the CBA); and National Metalcrafters v. McNeil, 784 F.2d 817, 824 (7th Cir. 1986) (concluding that Illinois' Wage Payment and Collection Act was preempted by § 301 and holding that "[t]he only basis of the state law claim in this case is that the company broke its contract to grant vacation pay of a certain amount. No state law required that any vacation pay be given or fixed the rate of such pay if given.")

Similarly, in the case at bar, West Virginia's Wage Collection and Payment Act, W. Va. Code § 21-5-1 et seq., does not establish Arnold's entitlement to the wages he is seeking but simply requires that employees be paid promptly upon termination of employment or dismissal. In order to establish if Arnold is entitled to be paid two hours of "reporting pay" for May 11, 1998 and three and a half hours of "incentive pay" for May 8, 1998, the Court must look to the CBA.

As discussed above, the CBA does provide that employees receive two hours pay if they report to work and are not given an opportunity to work because none is available. However, resolving the factual question of whether Arnold "reported to work" on May 11, 1998 requires an interpretation of the custom and practice of the Cabot facility. For example, what was Arnold's usual attire at work? What was the customary dress for those attending safety meetings? What does "report to work" mean? Did Arnold refuse to start work or stop work of his own volition?

The parties acknowledge that the CBA is silent on the issue of "incentive pay." Again, in order to evaluate whether Arnold

was entitled to receive a full day's pay on May 8, 1998, a day on which he did not report to work, would require interpretation of the custom and practice in the shop – the industrial common law.

Accordingly, because the Court finds that interpretation of the CBA is required, defendants are entitled to judgment as a matter of law on Count Two of plaintiff's complaint.

3. Tortious Interference with Employment Contract

Arnold alleges that Cabot and Matheny tortiously interfered with his employment contract with Raytheon, causing him to be constructively discharged by Dale Prim. The Fourth Circuit has indicated that district courts must examine the elements of the state law causes of action advanced in order to determine whether the Court must interpret the CBA. McCormick, 934 F.2d at 535.

To establish prima facie proof of tortious interference in West Virginia, a plaintiff must show:

> (1) existence of a contractual or business relationship or expectancy;

> (2) an intentional act of interference by a party that is outside[4] that relationship or expectancy;
> (3) proof that the interference caused the harm sustained; and
> (4) damages.

Syl. Pt. 2, Torbett v. Wheeling Dollar Sav. & Co., 314 S.E.2d 166 (W. Va. 1983). In other words, the Court would need to look at the CBA to determine the nature of the employment contract with which Cabot and Matheny allegedly tortiously interfered.

In International Bhd. Of Elec. Workers v. Hechler, 481 U.S. 851 (1987), the Supreme Court held that an employee's common law tort suit in state court against her union, charging that it had failed to fulfil its duty of providing safe conditions in the workplace was preempted because the court was required to interpret the CBA to determine whether such a duty existed and what its nature and scope would be.

Similarly, the Fourth Circuit, in McCormick, held that an employee's state tort claims were preempted by § 301 of the LMRA

[4] There is also a question as to whether Matheny and Cabot are in fact "strangers" to the employment contract given the October 1995 agreement that exists between Raytheon and Cabot, under which Arnold was working. However, because the Court is denying plaintiff's motion for summary judgment on other grounds, resolution of this question is not required.

where plaintiff's claims required the court to examine the CBA.[5] McCormick sued his former employer for intentional infliction of emotional distress, negligent infliction of emotional distress, conversion and negligence in the care of bailment. His claims arose out of his employer's disposal of the contents of his work locker upon his discharge. The Fourth Circuit found that:

> The circumstances that must be considered in examining management's conduct are not merely factual, but contractual, and the collective bargaining agreement is a crucial component of these circumstances. Cleaning out a locker is not a matter of intrinsic moral import but a question of legal authority – whether management had the lawful right to proceed as it did. The rightness or wrongness of the action has not been committed to the common law of tort, but to the legal arrangements embodied in a contractual agreement, in this case through collective bargaining. State law claims are preempted where reference to a collective bargaining agreement is necessary to determine whether a 'duty of care' exists or to define the nature and scope of that duty, that is, whether and to what extent, the employer's duty extended to the particular responsibilities alleged by the employee in his complaint.

934 F.2d at 536 (internal citations omitted).

Neither Cabot nor Matheny is a signatory to the CBA. In International Union, United Mineworkers v. Covenant Coal, 977

[5] See also Davis v. Bell Atlantic-West Virginia, Inc., 110 F.3d 245 (4th Cir. 1997), citing to McCormick and holding that employee's claims regarding breach of settlement agreement resolving grievance was preempted by the LMRA.

F.2d 895 (4th Cir. 1992), the Fourth Circuit examined whether § 301 conferred federal jurisdiction to hear claims against non-signatories of a collective bargaining agreement for tortious interference with that agreement. The court held that plaintiffs could not bring a § 301 claim against a non-signatory to the contract, but plaintiff's state law claim for tortious interference with the contract was preempted by § 301, notwithstanding that the defendant was not a signatory to the CBA. The court reached this seemingly inconsistent conclusion because one of the elements of tortious interference requires harm to the contract and that only by interpreting the contract can a court determine whether it has been breached. "We are cognizant of the apparent paradox, inherent in our decision of this case, holding that section 301 of the LMRA bars a federal cause of action for tortious interference with contract, yet simultaneously preempts the identical state law cause of action." Id. at 895-96. See also Shiflett v. ITO, 202 F.2d 260, 2000 WL 14214, **6 (4th Cir. 2000) (observing that "our decision in Covenant Coal clearly recognizes that § 301 can preempt state

law claims against a non-signatory to a collective bargaining agreement").

Consistent with McCormick and Covenant Coal, the Court finds that Arnold's state law claim of tortious interference is preempted

by § 301 because the claim necessarily requires the Court to interpret the CBA in determining whether all of the elements of the state law claim have been met. Accordingly, the Court finds that the defendants are entitled to judgment as a matter of law on Count One of the complaint.[6]

CONCLUSION

This Court has original jurisdiction over plaintiff's claims, and such claims are preempted by § 301 of the LMRA as a matter of law. Accordingly, the Court **DENIES** plaintiff's motion to remand the case [Docket No. 55], **DENIES** plaintiff's motion for summary judgment on Count Two of the complaint [Docket No.

[6] To the extent that Arnold sought to argue that he had raised a constructive discharge cause of action in his complaint, the Court finds that this claim was subsumed within the tortious interference claim set forth in Count One. Even had Arnold alleged this as a separate cause of action, the Court finds that interpretation of the CBA would be required and that such claim would also be preempted.

48], and **GRANTS** defendants' motion for summary judgment [Docket No. 47].

Furthermore, the Court **DENIES** as moot the parties' motions in limine [Docket Nos. 56, 57, 58, 59 and 63].

All matters pending before this Court having been resolved, this case is **DISMISSED** from the Court's docket.

It is so **ORDERED**.

The Clerk is directed to transmit copies of this order, and the attached decision of Shiflett v. I.T.O. Corp., 202 F.3d 260, 2000 WL 14214 (4th Cir. 2000), to all counsel of record.

ENTERED: May 8, 2000.

/s/
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IRENE M. KEELEY
UNITED STATES DISTRICT JUDGE