Case No. 11-1034

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

DIPONIO CONSTRUCTION CO., INC.,
Plaintiff—Appellant,

v.

INTERNATIONAL UNION OF BRICKLAYERS & ALLIED CRAFTWORKERS, LOCAL 9,
Defendant—Appellee,

NATIONAL LABOR RELATIONS BOARD
Intervenor.

On Appeal from the United States District Court for the Eastern District of Michigan

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STATEMENT OF JURISDICTION

This case is before the Court upon the appeal of DiPonio Construction Co., Inc., ("DiPonio") of a decision of the United States District Court for the Eastern District of Michigan, Judge Arthur J. Tarnow, issued on September 22, 2010, dismissing this case for lack of subject matter jurisdiction. DiPonio filed a motion for reconsideration on October 6, 2010, which was denied December 23, 2010. DiPonio filed a notice of appeal on January 6, 2011. This appeal appears to be timely under Federal Rule of Appellate Procedure 4(a)(1)(B), accounting for tolling under Rule 4(a)(4)(A).

The United States Court of Appeals for the Sixth Circuit has jurisdiction to hear this appeal under 28 U.S.C. § 1291, and should affirm the district court's dismissal for lack of subject matter jurisdiction.

STATEMENT REGARDING ORAL ARGUMENT

This case involves the straightforward application of well-settled legal principles. Accordingly, the National Labor Relations Board ("Board" or "NLRB") maintains that oral argument is unnecessary. However, if the Court deems oral argument appropriate, the Board requests to participate.

STATEMENT OF THE ISSUE

Whether the district court correctly dismissed this case because: a) there is

no basis for jurisdiction, under § 301[1] or otherwise; and b) this dispute is representational and within the primary jurisdiction of the NLRB.[2]

STATEMENT OF THE CASE

On July 31, 2009, the International Union of Bricklayers & Allied Craftworkers, Local 9, ("Local 9" or "the Union") initiated NLRB proceedings by filing a charge under § 8(a)(5) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(a)(5), asserting that DiPonio had unlawfully refused to bargain with Local 9. To resolve this issue, the Board will necessarily determine whether the parties are in a § 9(a) relationship with a continuing duty to bargain under the NLRA after expiration of the parties' contract, or instead were in a § 8(f) relationship without such a continuing duty to bargain. 29 U.S.C. §§ 159(a), 158(f).

During the NLRB investigation of this charge, DiPonio filed a complaint seeking to place precisely these same questions before the federal district court. The Board intervened to protect its jurisdiction, and moved to dismiss the district court proceedings. The magistrate judge agreed with the Board and Local 9 and recommended dismissal. The district court also agreed and dismissed the

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[1] Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185.

[2] In light of the jurisdictional defects in the complaint, the district court correctly dismissed the motion for summary judgment as moot, and did not address the merits of DiPonio's claim. Furthermore, the NLRB did not request sanctions before the district court and will not address this matter.

complaint. The district court held, inter alia, that the question whether the parties are in a § 9(a) relationship is a representational question that should be decided by the Board. The court further overturned the magistrate judge's order denying the Union's motion for sanctions, and imposed sanctions against DiPonio's counsel. The court subsequently denied DiPonio's motion for reconsideration. DiPonio appeals.

STATEMENT OF FACTS

DiPonio and the Union were bound by a collective bargaining agreement, which expired July 31, 2009. (RE 13 Exh 3, collective bargaining agreement p. 4 Art. I "Duration".)[3] The expired agreement contained a union recognition clause, which provided, in part:

> The Union has submitted to the Employer evidence of majority support, and the Employer is satisfied that the Union represents a majority of the Employer's Employees . . . . The Employer therefore voluntarily agrees to recognize the Union as the exclusive bargaining representative of all Employees . . . . The Employer and the Union acknowledge that they have a 9(a) relationship as defined under the National Labor Relations Act . . . .

Id. at 3-4, Art. VII(D) "Voluntary Recognition." By letter dated May 26, 2009, DiPonio notified the Union that it wished to terminate the collective bargaining agreement effective as of the agreement's expiration date, and stated that it would

[3] The district court record is referenced by "RE [#]," which is an abbreviation of "Record Entry No. [#]." Exhibits to record entries are referenced with the abbreviation "Exh [#]."

"no longer be a union signatory with Local 9." (RE 1 Exh A, correspondence of May 26, 2009.) In reply to the Union's subsequent inquiry, DiPonio declared that it did not want, and was not required, to bargain for a successor contract. (RE 44 Exh 7, NLRB administrative law judge decision pp. 5-7.)

A. Board Proceedings

Upon the expiration of the contract on July 31, 2009, Local 9 filed an unfair labor practice charge against DiPonio with Region 7 of the NLRB. (RE 4 Exh C, NLRB charge.) The Regional Director investigated the charge and issued an administrative complaint against DiPonio on February 16, 2010, alleging that Local 9 is the exclusive representative of the employees under § 9(a) of the NLRA, and that DiPonio refused to bargain with Local 9 in violation of § 8(a)(5) of the NLRA. (RE 6 Exh 3, NLRB complaint.) DiPonio defended against the allegation by claiming that DiPonio was in a bargaining relationship with Local 9 under § 8(f) of the NLRA, 29 U.S.C. § 158(f), not § 9(a) of the NLRA, and thus had no ongoing duty to bargain once the agreement expired. (RE 44 Exh 7, NLRB ALJ Decision p. 9.)

A hearing was held before NLRB Administrative Law Judge Margaret G. Brakebusch, who issued a decision on September 14, 2010, finding that DiPonio committed an unfair labor practice in refusing to bargain with Local 9. Id. In this decision, it was noted that "[t]he ultimate issue in this case is whether [DiPonio] is

an 8(f) contractor or a 9(a) contractor within the meaning of the [NLRA]. . . . If it is established that [DiPonio] and the Union have a 9(a) bargaining relationship, the issue then becomes whether [DiPonio] unlawfully . . . withdrew recognition [and] refused to bargain for a new contract with the Union." Id. at 2-3. The Administrative Law Judge analyzed the evidence presented by the parties—including the sworn testimony and demeanor of Local 9's president Nelson McMath and DiPonio's president Louis DiPonio—and made detailed findings of fact regarding the nature of the relationship between the parties. Id. at 3-14. The Administrative Law Judge considered and rejected precisely the same substantive legal and factual arguments regarding the application of § 8(f) and § 9(a) that DiPonio is now repeating in this case. Id. at 8-14.[4] Judge Brakebusch determined that DiPonio was in a § 9(a) relationship with Local 9, not a § 8(f) relationship, and had thus violated § 8(a)(5). Id. at 8-14, 20. Judge Brakebusch also determined that DiPonio's challenge to whether the Union had the support of the majority at the time of recognition was time-barred. Id. at 12-14. DiPonio filed exceptions with the Board pursuant to 29 C.F.R. 102.46 of the Board's regulations. (DiPonio Br.

[4] Among the arguments presented by DiPonio in this appeal that were addressed by the administrative law judge were arguments regarding NLRB cases Deklewa and Nova Plumbing (RE 44 Exh 7, NLRB ALJ Decision pp. 9-10), the contention that Local 9 surreptitiously inserted 9(a) language into an 8(f) contract (pp. 11, 13), and the contention that Local 9 lacks majority status either at the time of recognition or presently (pp. 12-14).

9.) These exceptions are currently pending. If DiPonio is aggrieved by the Board's final decision, DiPonio will have the right to file a petition for review in this Court (or in the D.C. Circuit) under § 10(f) of the NLRA, 29 U.S.C. § 160(f).

B. District Court Proceedings

While Board proceedings were pending, on February 11, 2010, DiPonio filed a one-count complaint for declaratory relief against Local 9 in the United States District Court for the Eastern District of Michigan. (RE 1.) DiPonio cited only general federal question jurisdiction, 28 U.S.C. § 1331, and the Declaratory Judgment Act, 28 U.S.C. § 2201, as bases for jurisdiction. Id. ¶¶ 3, 5. DiPonio's complaint sought a ruling on whether DiPonio had an "obligation to bargain" with Local 9. Id. ¶¶ 11, 14. Just as it argued in the unfair labor practice proceedings, DiPonio's district court complaint claims that it was in a § 8(f) relationship with Local 9, not a § 9(a) relationship. The complaint requested a declaration that "DiPonio no longer has a contract with the Union." Id. ¶ A. DiPonio then filed for summary judgment, "seeking a declaration that its contract with the Union is a Section 8(f) contract and that, therefore, DiPonio's CBA was properly terminated." (RE 4, mot. for summary judgment p.10.)

Local 9 filed a motion to dismiss on February 24, 2010, asserting lack of subject matter jurisdiction in the district courts and NLRA preemption under San Diego Building Trades Council v. Garmon, 359 U. S. 236 (1959). (RE 6, mot. to

dismiss.) On March 2, 2010, DiPonio responded by filing an Amended Complaint, adding a new "Count II" for breach of contract and citing § 301, 29 U.S.C. § 185, as a basis for jurisdiction. (RE 8, amended complaint ¶ 19, 20.) This amended complaint was filed "[t]o address concerns raised by the Union's counsel." (DiPonio Br. 7.) Count II seeks a judgment that Local 9 breached the collective bargaining agreement when it "fail[ed] to honor DiPonio's proper termination [of the contract]" by "attempt[ing] to force DiPonio to bargain for a new contract and to provide information." (RE 8, amended complaint ¶ 19, 20.)

In order to protect the Board's jurisdiction to resolve the unfair labor practice and representational disputes, the Board intervened in district court. (RE 23, mem. in support of mots. to intervene and dismiss.)[5]

C. The District Court's Decision

On June 23, 2010, the magistrate judge recommended dismissing the case for lack of jurisdiction. (RE 31.) The district court adopted the magistrate judge's recommendation and dismissed the case by opinion and order dated September 22, 2010. (RE 42.) In its decision, the district court noted that "the essence of what

[5] DiPonio then attempted to use the district court proceeding to delay the parallel Board proceedings by requesting a stay from the Board. (RE 26 Exh A, motion for stay of NLRB proceedings.) DiPonio argued to the Board that the Board should stay its proceedings and await the pending district court action. The Board denied the motion for a stay, noting that "there is no reason in law or in practical judicial expediency to stay the unfair labor practice case, which decides a representational issue, not a contract issue." (RE 26 Exh C, NLRB decision denying stay p.2.)

DiPonio seeks in Count I is a declaration that it has no duty to bargain with the Union following the termination of the CBA." Id. at 9-11. The court held that the NLRB has exclusive jurisdiction over that question.

Similarly, the district court ruled "that Count II . . . is disguised as a breach of contract claim but, in fact, requires this Court to resolve a representational issue within the jurisdiction of, and presently pending before, the NLRB." Id. at 11-15. Finding this representational issue is within the primary jurisdiction of the Board under this Court's decision in International Brotherhood of Electrical Workers v. Trafftech, Inc., 461 F. 3d 690, 694-95 (6th Cir. 2006), the district court declined to exercise jurisdiction over Count II and dismissed the complaint. (RE 42, pp.12-13, 23.) The district court then awarded sanctions to Local 9. Id. at 22-23.

SUMMARY OF ARGUMENT

The NLRB has exclusive jurisdiction to decide unfair labor practices under § 8 of the NLRA. This includes questions under § 8(a)(5) concerning the duty to bargain. The sole dispute between the parties concerns whether DiPonio currently has a duty to bargain with Local 9. This dispute is being resolved by the Board, and the Board's final decision may then be reviewed by this Court. Until then, in the circumstances of this case, the federal courts lack jurisdiction.

There is no § 301 jurisdiction over this case. The parties' contract expired prior to the alleged breach. Even if the parties had been in a § 8(f) relationship,

DiPonio makes no colorable argument as to how the expired contract could conceivably have been breached. Without a colorable allegation of breach, there is no § 301 jurisdiction.

Furthermore, the courts properly defer to the Board where pending Board proceedings will resolve a representational question raised before the court. The § 8(f)/§ 9(a) question is the crux of this dispute. This question is representational and will be resolved by the Board. DiPonio's attempts to characterize this dispute as one of "contract interpretation" are wrong. The contract is merely one among many possible sources of evidence that could be presented before the Board to show that Local 9 has or has not attained a majority and been voluntarily recognized under § 9(a) of the NLRA. Any timely, relevant, and admissible evidence that DiPonio may have regarding this question was or should have been presented to the Board.

ARGUMENT

This case presents no basis for district court jurisdiction; the district court generally has no jurisdiction to determine unfair labor practices or resolve representational questions which are currently pending before the Board. Though styled in part as an action for breach of contract under § 301, no colorable claim of such breach is alleged and this case is within the primary jurisdiction of the Board.

I. Burden of proof and standard of review

The subject matter jurisdiction of federal courts is limited to cases expressly authorized by both Constitution and statute. "[T]he fair presumption is . . . that a cause is without its jurisdiction, until the contrary appears." Turner v. Bank of N.-Am., 4 U.S. 8, 11 (1799). "[The Plaintiff] must allege in his pleading the facts essential to show jurisdiction . . . [and] must carry throughout the litigation the burden of showing that he is properly in court." McNutt v. Gen'l Motors Acceptance Corp., 298 U.S. 178, 189 (1936); see Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994); Ohio ex rel. Skaggs v. Brunner, 549 F.3d 468, 474 (6th Cir. 2008). Aside from factual findings, a decision to dismiss for lack of jurisdiction is reviewed de novo. Tackett v. M & G Polymers, USA, LLC, 561 F.3d 478, 481 (6th Cir. 2009); Angel v. Kentucky, 314 F.3d 262, 264 (6th Cir. 2002); United States v. Ritchie, 15 F.3d 592, 598 (6th Cir. 1994).

II. The district court does not have jurisdiction, under § 301 or otherwise.

A. There is no basis for jurisdiction over Count I.

As the Supreme Court held as long ago as 1938, "the power 'to prevent any person from engaging in any unfair practice affecting commerce,' has been vested by Congress in the Board and the Circuit Court of Appeals." Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 48-49 (1938) (citations omitted). In its landmark Garmon decision, 359 U.S. at 244-45, the Supreme Court stated that:

> At times it has not been clear whether the particular activity . . . was governed by § 7 or § 8 or was, perhaps, outside both these sections. But courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board. . . . When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board . . . .

(emphases added). Garmon preemption is a jurisdictional limit on the power of the court. Longshoremen v. Davis, 476 U.S. 380, 388-93 (1986). Garmon preemption applies wherever the protection or prohibition of §§ 7 or 8 is "arguable." Id. However, where a colorable breach of contract dispute under § 301 collaterally raises unfair labor practice issues, the Board and the courts generally have concurrent jurisdiction. Smith v. Evening News Ass'n, 371 U.S. 195 (1962); see Amalgamated Ass'n of ST., Elec. Ry. & Motor Coach Employees v. Lockridge, 403 U.S. 274 (1971); see also Serrano v. Jones & Laughlin Steel Co., 790 F.2d 1279, 1288 (6th Cir. 1986).[6] As discussed below, however, depending upon the circumstances the Board may defer to the courts or the courts may defer to the

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[6] DiPonio's discussion of "complete preemption" has no application to this case. (App Br 22-23.) "Complete preemption" is an exception to the well pleaded complaint rule in removal cases based on § 301 preemption; there is no "complete preemption" doctrine under Garmon. Alongi v. Ford Motor Co., 386 F.3d 716, 723 (6th Cir. 2004); see Lontz v. Tharp, 413 F.3d 435, 440-443 (4th Cir. 2005) ("Other courts . . . are uniform in finding that Garmon preemption under the NLRA does not completely preempt state laws so as to provide removal jurisdiction." (quotation marks and citations omitted)). The present case involves neither removal nor § 301 preemption of a state law cause of action.

Board. Trafftech, 461 F. 3d at 694-95. Similarly, where there is another independent federal basis for jurisdiction—such as a criminal action or antitrust action—the federal courts may decide labor law questions that arise collaterally to the action, particularly when the labor law question is a necessary part of an affirmative defense. United States v. Douglas, 398 F.3d 407 (6th Cir. 2005) (collateral labor issue raised in defense against criminal case); Connell Constr. Co. v. Plumbers & Steamfitters, 421 U.S. 616 (1975) (collateral labor issue in defense against antitrust case); see Kaiser Steel Corp. v. Mullins, 455 U.S. 72 (1982) (collateral labor issue in defense against contract enforcement).

Count I, however, concerns a question within the exclusive jurisdiction of the Board. DiPonio specifically asked the court to determine whether DiPonio's relationship with Local 9 is "governed by § 8(f) of the [NLRA] . . . or by § 9(a) of the NLRA." (RE 10, DiPonio's response to Local 9's mot. to dismiss pp.1-2.) The sole significance of this § 8(f) / § 9(a) dispute concerns whether DiPonio has a continuing statutory obligation to bargain under § 8(a)(5) with Local 9 after the expiration of the contract. This refusal to bargain "is arguably subject to § 7 or § 8." Garmon, 359 U.S. at 245.

In its brief, DiPonio urges this Court to consider substantive questions of NLRA law concerning when and how a union and employer can "convert" a § 8(f) relationship into a § 9(a) relationship. (DiPonio Br. 28-34.) However, this

iteration of its argument simply underscores that it is the NLRB's statutory duty to interpret and apply these provisions of the NLRA. For this reason, it is unsurprising that the bulk of the cases cited by DiPonio on these issues originate from NLRB proceedings.[7] As in those cases, here DiPonio will have the opportunity to present these arguments to this Court under § 10(f) *when there is a final Board decision* in the pending proceeding. 29 U.S.C. § 160(f). However, in these circumstances, this is the sole method for obtaining court review. Myers, 303 U.S. at 48-49; AFL v. NLRB, 308 US 401, 407-409 (1940). In short, the district courts lack jurisdiction over these questions absent some exception to Garmon, and no such exception is colorably alleged by DiPonio.

DiPonio's brief contends the district court has jurisdiction over Count I

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[7] See DiPonio Br. 28-34 (citing Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers, Local 3 v. NLRB, 843 F.2d 770 (3d Cir. 1988); Am. Auto. Sprinkler Sys., Inc. v. NLRB, 163 F.3d 209 (4th Cir. 1998); Hovey Electric, Inc. v. NLRB, 22 F. App'x 509 (6th Cir. 2001); James Luterbach Constr. Co., 315 NLRB 976 (1994); Int'l Ladies' Garment Workers' Union v. NLRB, 366 U.S. 731 (1961); Nova Plumbing, Inc. v. NLRB, 330 F.3d 531 (D.C. Cir. 2003). The sole exception is Sheet Metal Workers' Int'l Ass'n Local 19 v. Herre Bros., Inc., 201 F.3d 231 (3d Cir. 1999). Of course, in that case, there was valid § 301 jurisdiction because the sole dispute between the parties was whether the employer was bound by and in breach of a valid collective bargaining agreement, and the § 8(f)/§ 9(a) issue arose only collaterally because, under Luterbach, the standards for withdrawal from a multiemployer association differ substantially under § 8(f) as compared to § 9(a). Id. at 239-40. By contrast, in this case, as described below, there is undisputedly no present contract between the parties, no colorable allegation of breach during the contract term, and no dispute regarding withdrawal from the multiemployer association or termination of the contract; the only dispute concerns the duty to bargain under § 8(a)(5).

under general federal question jurisdiction, the Declaratory Judgment Act, and § 301. (DiPonio Br. 18-20.) This contention is incorrect. General federal question jurisdiction is displaced by the NLRA review provisions for consideration of unfair labor practice and representation issues. Myers, 303 U.S. at 48-49; AFL, 308 US at 407-409; see Whitney Nat'l Bank in Jefferson Parish v. Bank of New Orleans & Trust Co. 379 U.S. 411, 420 (1965) (citing, inter alia, Myers, 303 U.S. 41); Louisville & Nashville R.R. Co. v. Donovan, 713 F.2d 1243, 1245-46 (6th Cir. 1983) (noting that § 1331 is not available where Congress has provided a scheme of administrative review). Moreover, the Declaratory Judgment Act is not an independent source of federal jurisdiction. Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1950). Finally, Count I alleges no breach of contract, and facially does not purport to be a § 301 claim. See Textron Lycoming Reciprocating Engine Div., Avco Corp. v. UAW, 523 U.S. 653, 657 (1998).

Because Count I clearly concerns questions within the exclusive jurisdiction of the Board, the district court correctly dismissed Count I for lack of jurisdiction.

B. Count II is not a colorable claim of breach of contract under § 301.

In order for the district court to have Section 301 jurisdiction, there must be a *colorable* claim of breach of an existing contract. Tackett, 561 F.3d at 484; Arbaugh v. Y & H Corp., 546 U.S. 500, 513 & n.10 (2006) (citing Bell v. Hood, 327 U.S. 678 (1946)); see generally 13D Federal Practice & Procedure, Wright &

Miller, § 3564. Significantly, § 301 expressly requires an allegation of *both* 1) a contract, and 2) a *breach* of that contract. Textron Lycoming Reciprocating Engine Div., Avco Corp. v. UAW, 523 U.S. 653, 657 (1998). As the Supreme Court explained in Textron: "'Suits for violation of contracts' under § 301(a) are not suits that claim a contract is invalid, but suits that claim a contract has been violated." Id. Mere desire for a contract interpretation does not create § 301 jurisdiction. Id.[8]

As this Court stated in Tackett, although conclusive proof of a breach "is not a prerequisite to jurisdiction," the complaint must still establish that the "violation claim is 'colorable.'" 561 F.3d at 484. A claim is not "colorable" if it is "immaterial and made solely for the purpose of obtaining jurisdiction or is wholly insubstantial and frivolous." Arbaugh, 546 U.S. at 513 & n.10. In addition, a claim is not colorable where it is clearly foreclosed by Supreme Court law. Levering & Garrigues Co. v. Morrin, 289 U.S. 103, 108 (1933).

Under this standard, Count II is wholly insubstantial, frivolous, and clearly foreclosed by Supreme Court law. The purported "breach" recited in the

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[8] DiPonio's citations to the unpublished district court decision in Interior/Exterior Specialist Co. v. Local 334, No. 06-14154, 2007 WL 851771 (E.D. Mich. Mar. 21, 2007), and to Mattis v. Massman, 355 F.3d 902, 905 (6th Cir. 2004), do not contradict this holding of Textron. (DiPonio Br. 23.) The Local 334 case involves a breach of contract, and Mattis is yet another case of § 301 preemption that DiPonio has conflated with Garmon preemption and § 301 jurisdiction.

Complaint is the "fail[ure] to honor DiPonio's termination of the CBA . . . [and the] attempt[] to force DiPonio to bargain for a new contract and to provide information." (RE 8, amended complaint ¶¶ 19, 20.) DiPonio's best attempt to explain this claim states only that "if an employer terminates a §8(f) contract, the union is bound by the CBA to comply with the termination notice and accept the employer's withdrawal from the union." (DiPonio Br. 16-17.) This claim is wholly insubstantial and frivolous. No contractual basis for this claim is provided and Supreme Court caselaw forecloses DiPonio's claim.

In Advanced Lightweight, the Supreme Court held that any duties that survive the expiration of the contract are created by § 8(a)(5) of the NLRA, not by the contract. Laborers Health & Welfare Trust Fund for N. Cal. v. Advanced Lightweight Concrete Co., Inc., 484 U.S. 539, 548-49 (1988). Whether there is a "statutory duty to bargain in good faith is the kind of question that is routinely resolved by the administrative agency with expertise in labor law." Id. at 552. See also UAW, Local 33 v. R.E. Dietz, 996 F. 2d 592, 595 (2d Cir. 1993) ("Because the [NLRB] generally has exclusive jurisdiction over [unfair labor practice] claims, the district court would not have jurisdiction over . . . [a claim for a] post-expiration obligation for the payment of vacation pay."). Count II is in direct conflict with this principle. Even assuming the parties were in a § 8(f) relationship, it is undisputed that the contract is expired. Thus, any obligations

Local 9 may owe DiPonio are solely features of NLRA law, not the contract. No coherent explanation is given—or could be given—as to what post-contractual actions by Local 9 assertedly violating a post-contractual obligation to "comply" with the termination can survive Advanced Lightweight. "It follows that the federal district court was without jurisdiction because the federal question presented was plainly unsubstantial, since it had, prior to the filing of the bill, been foreclosed by [previous Supreme Court decisions], and was no longer the subject of controversy." Levering & Garrigues Co., 289 U.S. at 108.

Additionally, Count II was "made solely for the purpose of obtaining jurisdiction." Arbaugh, 546 U.S. at 513 n.10. DiPonio's own brief acknowledges that Count II was added to its complaint to "address [jurisdictional] concerns raised by the union."[9] (DiPonio Br. 7.) DiPonio is grasping at straws, clutching for some basis for district court jurisdiction which simply doesn't exist.

In sum, there is no colorable allegation of breach of contract under § 301. Absent § 301 jurisdiction, Count II is preempted by Garmon.

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[9] Furthermore, DiPonio's brief squarely challenges the Administrative Law Judge's decision, despite the fact that the Administrative Law Judge's decision is not the final decision of the Board, and is not properly before this court. DiPonio Br. 53-54 (discussing "fundamental error" in the NLRB ALJ's decision). DiPonio's litigation conduct—including filing this lawsuit in anticipation of the Regional Director's complaint and trying to delay the NLRB's hearing—make it clear that DiPonio is seeking to impede the Board's resolution of this dispute and circumvent the statutorily required procedures for review.

III. The district court correctly concluded that DiPonio's claim is within the primary jurisdiction of the Board.

The district court's decision to dismiss Count II appropriately deferred to the Board under the primary jurisdiction doctrine. This Court aptly summarized the primary jurisdiction doctrine in Trafftech, 461 F. 3d at 694-95:

> When a dispute is "primarily representational" under § 7 or § 8 of the National Labor Relations Act, simply referring to the claim as a "breach of contract" is insufficient for the purposes of § 301 federal courts' jurisdiction, but matters primarily of contract interpretation, which potentially implicate representational issues, remain within the federal courts' § 301 jurisdiction.

(internal quotations omitted). DiPonio's brief quotes heavily from Trafftech but omits the most pertinent language of that decision, language which the district court correctly determined bound the court to dismiss this case:

> [There are] two types of situations in which a dispute will be treated as primarily representational: where the Board has already exercised jurisdiction over a matter and is either considering it or has already decided the matter . . . or where the issue is an initial decision in the representation area.

Id. at 695 (emphasis added, citations, quotation, emendation marks omitted). As the district court correctly held, the Board has already exercised jurisdiction, and its decision in the representation area is forthcoming. (RE 42, district court decision pp. 12-15.)

Similarly, in Olympic Plating this Court held that the district court properly dismissed an alleged "breach of contract" claim brought by a union seeking a

determination that the employer is prohibited from recognizing another union under the contract. Local 852, Boilermakers v. Olympic Plating Indus., Inc, 870 F.2d 1085, 1089 (6th Cir. 1989). This case arose out of the decision of a local union to change its affiliation. Id. at 1087. The disaffiliated international sued the local and employer in district court, and characterized the employer's decision to recognize the new international affiliation as a breach of the collective bargaining agreement. Id. at 1089. A charge was also filed by the disaffiliated international with the Board against the employer for violation of the duty to bargain and seeking a determination that the disaffiliated international was the exclusive bargaining representative under § 9(a). Id. The district court dismissed the complaint. Id. at 1089-90. This Court affirmed as follows:

> [A]lthough [this claim] is styled as presenting a 'breach of contract' claim, [it] is virtually identical to the pending unfair labor practice charge before the board. Both proceedings . . . must decide if the [affiliated international] is the proper bargaining representative of [the] employees and, accordingly, if [the employer's] recognition of the [affiliated international] and withdrawal of recognition from the [disaffiliated international] were proper.
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> * * *
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> [T]he instant NLRB proceeding involves a representation issue, i.e., a determination of which union should represent the[se] employees. There is a strong policy in favor of using the procedures vested in the Board for representational determinations in order to promote industrial peace. That the [Plaintiff] has characterized the instant claim as a § 301 contract claim is of no consequence. To fail to apply this policy to § 301 actions would allow an end run around provisions of the NLRA under the guise of contract interpretation.

Id. (emphasis added, internal citations and quotation marks omitted).

Other circuits have applied a similar rule. For example, in Minn-Dak Farmers a union sought a declaratory judgment that the union had validly affiliated with another labor organization, and that the employer's refusal to bargain with the union after affiliation was a breach of contract. The Eighth Circuit sua sponte raised subject matter jurisdiction, and held that the case must be dismissed because it "presents a pure question of representation, and is within the exclusive jurisdiction of the NLRB." Minn-Dak Farmers Coop., Employee Org. v. Minn-Dak Farmers Coop., 3 F.3d 1199, 1201 (8th Cir. 1993). In West Point the Fifth Circuit held that a declaratory judgment suit to determine a company's contractual and bargaining obligations owed to an alleged successor union must be dismissed in favor of Board jurisdiction. West Point-Pepperell, Inc. v. Textile Workers, 559 F.2d 304, 307 (5th Cir. 1977). For the same reason, in Ketchikan Pulp, the Ninth Circuit dismissed a purported § 301 suit by the union attempting to enforce later-acquired facilities clauses in the contract and thereby obtain representative status, reasoning that the Plaintiff was "attempting an end run around [the NLRB] under the guise of contract interpretation." Intern. Woodworkers of Am., Local 3-193 v. Ketchikan Pulp Co., 611 F.2d 1295, 1299 (9th Cir. 1980). And in Amalgamated Clothing & Textile Workers Union v. Facetglas, Inc., 845 F.2d 1250, 1252 (4th Cir. 1988), the Fourth Circuit cautioned against allowing parties to use § 301 to

"circumvent an existing Board disposition of the merits of their representational claims."[10] As stated by the Ninth Circuit, deference to the Board "is rooted in both the superior expertise of the Board . . . and the incompatibility of the orderly function of the process of judicial review with initial district court consideration of representational issues." Steamfitters L ocal 342 v. Valley Engineers, 975 F.2d 611, 613 (9th Cir. 1992) (quotation marks omitted).[11]

DiPonio's attempt to analogize to the facts of Trafftech is unavailing. In Trafftech, the court determined to exercise jurisdiction for claims where the Board had deferred to the court and expressly declined jurisdiction over the dispute. 461 F.3d at 692, 695. Though the court exercised jurisdiction under those circumstances, Trafftech clearly reaffirmed the significance of the NLRB's primary jurisdiction.

The case in Trafftech arose when the employer entered into two § 8(f) agreements with different unions, promising the same work to both unions. The unions each invoked the arbitration clauses of their contracts and sought to compel

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[10] See also Allied Workers, Local 682 v. Bussen Quarries, Inc., 849 F.2d 1123, 1125 (8th Cir.1988) (finding lack of jurisdiction to enforce arbitration clause where the defendant asserted that the employees were not in the bargaining unit covered by the contract); Local 204, IBEW v. Iowa Elect. Light & Power Co., 668 F.2d 413, 416-20 (8th Cir. 1982) ("[A] dispute over a representational matter is a situation calling for a denial of district court jurisdiction.")

[11] Where an issue is within an agency's primary jurisdiction, deference to the agency is required. See Reiter v. Cooper, 507 U.S. 258, 271 (1993); United States v. Philadelphia Nat. Bank, 374 U.S. 321, 353 (1954) and cases cited therein.

the employer to assign the work to them. The employer refused to arbitrate, claiming instead that the grievances were actually claims of majority representation under § 9(a) and filing a representation petition with the Board asking for an election. The Board, however, analyzed the issues presented in the case and decided that the dispute would best be resolved through arbitration, and deferred. The district court then concluded that the unions were not seeking to be the exclusive representative of the employees, and that, to the contrary, the unions were merely seeking to enforce their respective agreements.

On review, this Court held that the district court appropriately exercised jurisdiction. Reaffirming Olympic Plating, this Court stated that a dispute will be considered "primarily representational" and the court will defer in at least the following two situations: 1) "where the Board has already exercised jurisdiction over a matter and is either considering it or has already decided the matter," and 2) "where the issue is an initial decision in the representation area." Trafftech, 461 F. 3d at 695.[12] However, because the Board in that case had declined to exercise jurisdiction, and because the dispute was not representational, the primary

[12] See also Carpenters Local 1846 v. Pratt-Farnsworth, Inc., 690 F.2d 489, 521 (5th Cir. 1982) (finding § 301 jurisdiction over bargaining unit issues only "where no action by the Board has been taken or is taking place at all"); Trustees of Colorado Statewide Iron Workers (Erector) Joint Apprenticeship & Training Trust Fund v. A & P Steel, Inc., 812 F.2d 1518, 1524-27 (10th Cir. 1987) (finding jurisdiction to decide the case "at least where the same representational question is not pending before the NLRB.").

jurisdiction doctrine did not apply.

In many ways, the relevant facts of Trafftech are precisely the opposite of the present case. Here the Board has steadfastly asserted jurisdiction and vigorously defended its primary authority to resolve this dispute, the sole dispute between the parties is representational, there is no bargaining agreement currently in effect between the parties, the complaint merely recites "breach of contract" without making any colorable claim of breach, and the employer has filed a frivolous § 301 action in an effort to disrupt the Board's jurisdiction. The present case instead mirrors Olympic Plating in that the complaint is virtually identical to the NLRB charge and concerns the nature of the representational relationship.

The § 8(f)/§ 9(a) question here is statutory and representational, not contractual.[13] A § 9(a) relationship is a statutorily-defined bargaining relationship between an employer and the majority representative of the employees. Bargaining obligations apply at all times, regardless of whether any contract is in effect. NLRB v. Katz, 369 U.S. 736 (1962). By contrast, a § 8(f) relationship is a statutorily-defined bargaining relationship between a construction employer and a

[13] It should be noted that, in other filings, DiPonio has acknowledged the statutory character of the § 8(f)/§ 9(a) dispute: "The question of whether a collective bargaining agreement is governed by §8(f) or §9(a) . . . is answered by the provisions of the [NLRA], not by language in a contract." RE 33, DiPonio's Obj. Rep. & Rec. p.4; see also RE 4, DiPonio's Mem. Supp. Mot. Summ. J. pp.10-11 (same); RE 10, DiPonio's Resp. Def. Mot. Dismiss 8 ("breach of contract" claim is "answered by the provisions of [the NLRA], not by language in a contract.").

non-majority representative of employees. The parties are free to choose whether to bargain for a contract or not. John Deklewa & Sons, 282 NLRB 1375 (1987). The Board frequently addresses the intricate relationship between § 9(a), § 8(f), and § 8(a)(5), and has struck a careful balance between the competing policies underlying these provisions.

The present dispute—like so many § 8(f)/§ 9(a) disputes the Board routinely resolves—concerns voluntary recognition. See, e.g., Central Illinois Construction, 335 NLRB 717, 718-19 (2001). A wide variety of evidence can be produced to prove or disprove that voluntary recognition has occurred, and language in an agreement is only one of many pieces of evidence that may be considered. See id. at 718-19. The NLRB also determines questions of when a challenge to voluntary recognition is timely. See Casale Industries, 311 NLRB 951, 953 (1993).

The district court was plainly correct in holding that the legal principles of Olympic Plating and Trafftech directly apply to this case. This dispute is "primarily representational" and the Board "has already exercised jurisdiction over [this] matter." Trafftech, 461 F. 3d at 694-95. Furthermore, this case presents "an initial decision in the representation area." Id. As such, the district court correctly deferred to the Board and declined to exercise jurisdiction over this case.

CONCLUSION

For the reasons stated herein, the National Labor Relations Board requests that the decision of the district court be affirmed.

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CERTIFICATE OF SERVICE

I hereby certify that on March 24, 2011, I caused this "Brief of Intervenor National Labor Relations Board" to be electronically filed with the Court via CM/ECF and served pursuant to Local Rule 25(f) on: John G. Adam, jga@leggioisrael.com; and Stephen A. Wright, steve@sawpc.com.

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Record Entry	Description
RE1	DiPonio’s Complaint
RE1-2, Ex. A	Communications between DiPonio and Local 9
RE4	DiPonio’s Motion for Summary Judgment
RE4-5, Ex. C	Local 9’s Unfair Labor Practice Charge
RE6	Local 9’s Motion to Dismiss
RE6-2, Ex. 1	Communications between DiPonio and Local 9
RE6-4, Ex. 3	NLRB Complaint against DiPonio
RE8	DiPonio’s Amended Complaint
RE10	DiPonio’s Response to Local 9’s Motion to Dismiss
RE13-4, Ex. 3	Collective Bargaining Agreement
RE23	NLRB Memo in Support of Motion to Intervene and Dismiss
RE26-2, Ex. A	DiPonio’s Motion for Stay of NLRB Proceedings
RE26-4, Ex. C	NLRB’s Order denying Motion for Stay of NLRB Proceedings
RE31	Magistrate Judge’s Report and Recommendation to Dismiss
RE33	DiPonio’s Objection to Magistrate Judge’s Report and Rec.
RE42	District Court’s Decision to Dismiss
RE43	Final Judgment
RE44-8, Ex. 7	NLRB Administrative Law Judge Decision