Case No. 16-3737

United States Court of Appeals
FOR THE SIXTH CIRCUIT

DHSC, LLC D/B/A AFFINITY MEDICAL CENTER,

Plaintiff—Appellant,

v.

CALIFORNIA NURSES ASSOCIATION/NATIONAL NURSES ORGANIZING COMMITTEE (C.N.A./NNOC), AFL-CIO,

Defendant—Appellee.

Appeal from the United States District Court
for the Northern District of Ohio
Civil Action No. 5:13-cv-1770

BRIEF OF AMICUS CURIAE NATIONAL LABOR RELATIONS BOARD URGING AFFIRMANCE OF THE JUDGMENT ON APPEAL IN SUPPORT OF DEFENDANT-APPELLEE

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STATEMENT OF AMICUS

The National Labor Relations Board (NLRB or Board)[1] is an independent federal agency created by Congress to enforce and administer the National Labor Relations Act (NLRA or the Act), 29 U.S.C. § 151 *et seq*., which regulates labor relations between most private-sector employers in the United States, their employees, and the authorized representatives of their employees. Section 9 of the NLRA empowers the Board to determine appropriate bargaining units, to conduct secret ballot representation elections, to certify the election results, and depending on the outcome of the election, to certify a union as the exclusive bargaining representative under the Act. 29 U.S.C. § 159. The NLRA additionally proscribes certain conduct by employers and by labor organizations as unfair labor practices, and empowers the NLRB with exclusive jurisdiction to prevent and remedy the commission of such unfair labor practices. 29 U.S.C. §§ 158 and 160. *See generally A.F.L. v. NLRB*, 308 U.S. 401, 405 (1940); *Nat'l Licorice Co. v. NLRB*, 309 U.S. 350, 365 (1940).

The Board's interests in this case include protecting its jurisdiction over representation and unfair labor practice proceedings, ensuring that employees enjoy the fullest possible freedom to choose representatives for collective-

[1] In this brief, references to "the NLRB" to "the Agency" refer to the Agency as a whole. "The Board" refers to the appointed five-member statutory body known as the National Labor Relations Board.

bargaining, and ensuring that its election agreements, certifications, and decisions are not negated through collateral litigation.

STATEMENT OF THE CASE

I. Background

The dispute at issue here arises out of a purported "implied-in-fact" agreement ("Implied Agreement") alleged in the First Amended Complaint (Complaint) filed by Plaintiff-Appellant DHSC, LLC, d/b/a Affinity Medical Center (Affinity). Amended Complaint, R. 18 at Page ID# 200. The Complaint seeks enforcement of that Implied Agreement pursuant to Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185.

The Implied Agreement arose out of an effort by Defendant-Appellee California Nurses Association/National Nurses Organizing Committee/CNA (CNA or Union) to organize registered nurses employed by Affinity. There is no dispute here that the agreement was never executed by the parties. Affinity alleges in its Complaint that pursuant to the purported Implied Agreement, the parties agreed to submit disputes to final and binding arbitration. Amended Complaint, R. 18 at Page ID# 205, 207, 208.

II. Proceedings before the NLRB and subsequent petition for review before the Court of Appeals for the District of Columbia Circuit

Subsequently, on August 20, 2012, the Union filed a petition with Region 8 of the NLRB, in Cleveland, Ohio, seeking to represent registered nurses working at

the Massillon, Ohio facility operated by Affinity. On August 22, Affinity and the Union signed a formal "Consent Election Agreement," using Form NLRB-651.[2] Among other provisions, the parties explicitly agreed in paragraph 12 that:

> Objections to the conduct of the election or conduct affecting the results of the election, or to a determination of representation based on the results of the election, may be filed with the Regional Director within 7 days after the tally of ballots has been prepared and made available to the parties. The Regional Director will serve a copy of the objections on each of the other parties. If objections are sustained, the Regional Director may include in the report an order voiding the results of the election and conduct a new election under the terms of this Agreement at a date, time, and place to be determined by the Regional Director. If the challenges are determinative of the results of the election, the Regional Director shall investigate the challenges and issue a report. The method of investigation of objections and challenges, including whether to hold a hearing, shall be determined by the Regional Director, whose decision shall be final.

[R. 45-2, at Page ID# 542-43]. Additionally, in paragraph 15, Affinity and the Union agreed that "[a]ll rulings and determinations made by the Regional Director will be final, with the same force and effect in that case as if issued by the Board." *Id.* The signed agreement contained no caveats or changes to the standard form language.

The signed Consent Election Agreement was approved by the NLRB's Regional Director for Region 8 the same day it was signed. *Id.* Affinity does not dispute that neither party advised the Regional Director that any previous or

[2] A copy of the signed Regional Director-approved Consent Election Agreement is attached to the Union's Motion to Dismiss [R. 45-2, at Page ID# 541-43].

conflicting agreements existed between them with respect to the election.[3] Thereafter, in accordance with the terms of the consent agreement, the NLRB's Regional office supervised and conducted the election on August 29, 2012. One hundred votes were cast for the Union, 96 against, with seven challenged ballots.[4]

Because the number of challenged ballots could determine the election's outcome, the Regional Director investigated the matter, soliciting statements of position from Affinity and the Union. The Union provided its position on the challenged ballots on September 17, 2012; Affinity did not file any statement or response regarding the challenged ballots. On September 5, 2012, Affinity filed with the Regional Director a statement of its objections to the election. In a letter dated September 7, the Regional Director requested that Affinity provide its supporting documents, and advised that the failure to provide supporting evidence "will result in your objections being overruled without further investigation." *Id.* at Page ID# 548.

On September 21, 2012, the Regional Director issued a report on the challenged ballots and objections, overruling Affinity's objections because no

[3] *See* Respondent's Post-Hearing Brief, R. 45-3, at Page ID# 593 (acknowledging that "the Hospital did not disclose the terms of the agreement to the Regional Director").

[4] The Board agent supervising the election challenged the ballots of seven voters whose names did not appear on the list of eligible voters.

substantiating evidence had been submitted. *Id.* The report concluded that four of the seven challenged ballots were cast by eligible voters, and counting those ballots resulted in a majority vote for Union representation by CNA. *Id.* Consequently, on October 5, 2012, the Regional Director certified the Union as the representative of the nurses at Affinity, pursuant to Section 9(a) of the NLRA, 29 U.S.C. § 159. [Motion to Dismiss, R. 45-2, at Page ID# 564].[5]

Following certification, the Union requested that Affinity begin bargaining, but Affinity refused to bargain and denied Union representatives access to its facilities. Subsequently, the Union filed charges with the NLRB, and the Regional Director then issued an administrative unfair labor practice complaint alleging various NLRA violations. [Motion to Dismiss, R. 45-2, at Page ID# 509-18]. In its answer before the NLRB, Affinity raised several affirmative defenses, in particular, noting for the first time before the NLRB that: (1) the NLRB's certification of the Union as exclusive bargaining representative was "invalid, and unenforceable, inasmuch as the representation election . . .was held not only pursuant to a consent election agreement, but also pursuant to an oral 'ad hoc'

[5] NLRA Section 9(a) states, in pertinent part, that "Representatives designated or selected for the purposes of collective bargaining by the majority of employees in a unit appropriate for such purposes shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. . . ." 29 U.S.C. § 159(a).

agreement between Affinity and the [Union] which provided that an arbitrator possessed exclusive jurisdiction to determine challenged ballots and objections related to the conduct of the representation election"; and (2) pursuant to that same "oral 'ad hoc' agreement . . . an arbitrator possesses exclusive jurisdiction over the allegations set forth by the Complaint." [Motion to Dismiss, R. 45-2, at Page ID# 531-32].

On April 20, 2015, a three-member panel of the Board issued its decision and order finding, *inter alia*, that Affinity had unlawfully refused to bargain with the Union and discriminatorily denied Union representatives access to its facility in retaliation for their representational activities in violation of the Act. *DHSC, LLC*, 362 NLRB No. 78, slip op. at 2 (2015). There, the Board specifically rejected Affinity's "defense that an oral ad hoc agreement between the parties gave exclusive jurisdiction to an arbitrator to determine the complaint allegations." *Id.* at n.3. As the Board reasoned:

> The parties have no collective-bargaining agreement setting forth an agreed-upon grievance-arbitration procedure. See, e.g., *Arizona Portland Cement Co.*, 281 NLRB 304, 304 fn. 2 (1986). In addition, deferral is generally inappropriate where the parties have not had "a long and productive collective-bargaining relationship." *United Technologies Corp.*, 268 NLRB 557, 558 (1984). Here, the relationship was neither long nor productive. See *San Juan Bautista Medical Center*, 356 NLRB No. 102, slip op. at 2 (2011), and cases cited there.

DHSC, LLC, 362 NLRB No. 78, slip op. at 2 n.3 (2015).[6]

The Board's unfair labor practice decision is currently pending before the United States Court of Appeals for the District of Columbia Circuit, on Affinity's petition for review and the NLRB's cross-application for enforcement of the order under Section 10(e) and (f) of the Act, 29 U.S.C. § 160(e) and (f). *DHSC, LLC v. NLRB (Affinity Med. Ctr.)*, Nos. 15-1426, 15-1499 (D.C. Cir. petition filed Nov. 14, 2015).[7] In that proceeding, Affinity argues that its election challenges and objections, and the unfair labor practice allegations against it, "should have been decided by deferral to [Affinity] and the Union's alternative dispute resolution system." *See* Affinity Answer to NLRB Cross-Application for Enforcement, *Affinity Med. Ctr.*, No. 15-1426 (D.C. Cir.), filed Jan. 15, 2016 at 4-5.

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[6] The third member of the panel joined in rejecting the defenses on the ground that the Federal Arbitration Act, 9 U.S.C. § 2, explicitly requires that agreements to arbitrate must be in writing. *Id.*

[7] This case is currently in abeyance pending the resolution of proceedings on remand from another D.C. Circuit case, *Hospital of Barstow,* similarly involving a consent election agreement entered into when the Board lacked a quorum. *See* Order Holding Case in Abeyance, *Affinity Med. Ctr.*, No. 15-1426 (D.C. Cir. Oct. 26, 2016) at 1-2. In *Barstow*, the D.C. Circuit remanded the case for the Board's interpretation of the National Labor Relations Act "in the context of a consent election as to which the employer and the union agree that the Regional Director's decisions are final." *Hospital of Barstow v. NLRB*, 820 F.3d 440, 444 (D.C. Cir. 2016). Subsequently, the Board issued a new decision in *Hospital of Barstow*, 364 NLRB No. 52 (2016), and the enforcement case returned to the D.C. Circuit, which has ordered final briefs to be filed by May 17, 2017. Nos.16-1289, 16-1343 (clerk's order filed January 23, 2017).

III. District Court Proceedings

In August 2013, Affinity filed its complaint in the district court below, alleging breach of the Implied Agreement governing election procedures and labor relations between the parties. [Initial Complaint, R. 1 Page ID# 1-21]. The complaint, which was later amended [Amended Complaint, R. 18 Page ID# 198-212], sought unspecified damages, specific performance, and a declaratory judgment compelling CNA to submit to final and binding arbitration the disputes pending before the NLRB related to objections and voter challenges in the representation election, and the subsequent unfair labor practice allegations. *Id.* at Page ID# 209-10.

CNA moved to dismiss Affinity's complaint for failure to state a claim. [Motion, R. 12 at Page ID# 51-72]. The district court below denied that motion, finding that Affinity had adequately pled the existence of an implied-in-fact agreement. [Order, R. 22 at Page ID# 347-48]. CNA subsequently answered the complaint, moved to dismiss for lack of subject-matter jurisdiction, and moved to stay the proceedings. [Answer, R. 24 at Page ID# 370-83]; [Amended Answer, R. 71 at Page ID# 1117-32]; [Motion, R. 45 at Page ID# 475-77]; [Motion, R. 46 at Page ID# 875-84]. The district court construed CNA's motion to dismiss as a motion for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure. [Order, R. 47 at Page ID# 885]. The NLRB submitted an

amicus curiae brief in support of CNA's motion to dismiss for lack of subject-matter jurisdiction. [Memorandum, R. 63-2 at Page ID# 1059-79]. The district court subsequently issued an opinion and order granting the Union's motion to dismiss for want of subject-matter jurisdiction, because Affinity "failed to identify any disputes outside of [NLRB] primarily representational preemption." [Order, R. 74 at Page ID# 1153]. The district court entered a final judgment dismissing Affinity's complaint, from which Affinity appeals. [Judgment, R. 75 at Page ID# 1155].

ARGUMENT

THE DISTRICT COURT CORRECTLY HELD THAT IT LACKED JURISDICTION OVER THIS CASE

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). A judgment based on 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).

A. Section 301 of the LMRA does not provide jurisdiction to district courts over representation matters within the primary, if not exclusive, jurisdiction of the NLRB

The district court correctly found that it could not exercise jurisdiction over this purported contract dispute under Section 301 of the LMRA because the dispute was "primarily representational." [Order, R. 74 at Page ID# 1151]. Section 301 provides district courts with jurisdiction over actions for violations of contracts between employers and labor organizations.[8] As this Court has held repeatedly, however, when a dispute is primarily representational, the NLRB has exclusive jurisdiction over the matter. *See DiPonio Constr. Co. v. Bricklayers, Local 9*, 687 F.3d 744, 749-50 (6th Cir. 2012); *Elec. Workers, Local 71 v. Trafftech, Inc.*, 461 F.3d 690, 694-95 (6th Cir. 2006). A dispute is "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 union's unresolved

[8] Section 301(a), 29 U.S.C. § 185(a), provides:

> 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.

representational status must be determined in order to decide the dispute ("where the issue is an 'initial decision[] in the representation area'"). *Trafftech,* 461 F.3d at 695 (internal citations omitted). This Circuit recognizes exceptions to this general rule of preclusion only where "the issues before the district court and the NLRB were different . . . or where the NLRB explicitly declined to decide the issue and instead deferred to the district court." *DiPonio,* 687 F.3d at 751.

Accordingly, where a contract dispute brought under Section 301 of the LMRA is "primarily representational," a district court may not exercise jurisdiction if, as here, the Board has already exercised its jurisdiction and is considering, or has already decided the matter. *Trafftech,* 461 F.3d at 693; *see also Marine Engineers' Dist. No. 1, Pac. Coast Dist. v. Liberty Maritime Corp.*, 815 F.3d 834, 843 (D.C. Cir. 2016). The district court below appropriately observed, "[t]hat the Section 301 disputes at issue here are 'primarily representational' is evident from Affinity's stated requests for relief," including specific performance of the Implied Agreement's terms and conditions (which include submission to arbitration of the election challenges and objections), and a declaratory judgment mandating the parties to submit all unresolved disputes under the Implied Agreement to final and binding arbitration. [Order, R. 74 at Page ID# 1151].

Likewise, the issues in the pending unfair labor practice proceeding now pending before the D.C. Circuit are "primarily representational." The D.C.

Circuit's resolution of that dispute depends upon an "initial determination" of the Union's status as representative of employees—that is, whether Affinity violated the Act depends upon the validity of the Union's certification by the NLRB. *See Trafftech*, 461 F.3d at 695. Thus, the Board order that is the subject of that ongoing D.C. Circuit enforcement proceeding found that Affinity refused to bargain with CNA as the exclusive representative of its employees, and that its conduct in denying access to Union representatives was in retaliation for the Union's *representational* activities. *DHSC, LLC*, 362 NLRB No. 78, slip op. at 2. Because the Union's representational status must be determined as a factual predicate to both of these allegations, both involve an "initial decision in [a] representation area." *Trafftech*, 461 F.3d at 695.

In short, the instant action clearly seeks to have a district court decide issues that are "primarily representational," and accordingly, within the primary, if not exclusive, jurisdiction of the Board. As this Circuit has observed in an analogous situation, characterizing a representational dispute as merely contractual does not vest district courts with jurisdiction:

> the instant NLRB proceeding involves a representation issue, *i.e.*, a determination of which union should represent the 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.

Boilermakers v. Olympic Plating Indus., Inc., 870 F.2d 1085, 1089 (6th Cir. 1989) (upholding dismissal of § 301 suit) (citations and internal quotation marks omitted). *Accord Trafftech*, 461 F.3d at 695-96 ("When a dispute is primarily representational . . . simply referring to the claim as a 'breach of contract' is insufficient for the purposes of § 301 federal courts' jurisdiction").

As the district court correctly concluded, "[t]his is not a case where 'the issues before the district court and the NLRB were different . . . or where the NLRB explicitly declined to decide the issue and instead deferred to the district court.'" [Order, R. 74 at Page ID# 1151] (quoting *DiPonio Constr. Co.*, 687 F.3d at 751). On the contrary, as noted, Affinity's Section 301 suit raises the precise issues previously addressed by the Board, now pending in front of the D.C. Circuit: whether the election challenges and objections and, ultimately, the Union's representation rights and Affinity's bargaining obligations, will be determined by an arbitrator or by the Board. *See* Affinity Answer to NLRB Cross-Application for Enforcement, *Affinity Med. Ctr.*, No. 15-1426 (D.C. Cir.) filed Jan. 15, 2016 at 4-5. The Board decided that question when it certified the Union as the employees' collective bargaining representative and exercised its discretion to decline deferral. The D.C. Circuit possesses exclusive jurisdiction to review that decision.[9]

[9] Section 10 of the Act provides that once the Board has filed the record of its proceedings with a court of appeals on a petition for review or application for

Accordingly, the issues raised in this instant proceeding are already pending before a sister court of appeals. Thus, in addition to the district court's lack of jurisdiction over "primarily representational" issues, the instant proceeding amounts to a collateral attack on the Board's proceeding, which is properly proceeding through appellate review pursuant to Section 10(e) and (f) of the NLRA, 29 U.S.C. § 160(e), (f).

The district court below properly recognized that Affinity's action here is exactly what this Court has previously disfavored—an attempted "end run" around the statutory procedure for the proper resolution of representational disputes. *See Olympic Plating*, 870 F.2d at 1089. Thus, this Court should affirm the lower court's rejection of that collateral attack.

B. There is no merit to Affinity's key argument that the Board did not have jurisdiction over the representation matter until it certified the election

There is no merit to Affinity's argument that the disputes it seeks to arbitrate are not primarily representational because they predate the Board's election certification [Appellant's Br. at 13-14]. Affinity cites no authority in support of this novel theory limiting the NLRB's primary jurisdiction. Indeed, the text of the

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enforcement of a final order, "the jurisdiction of the [court of appeals] shall be exclusive . . ." 29 U.S.C. § 160(e), (f).

statute provides otherwise. Under Section 9 of the Act, the filing of a petition triggers the NLRB's jurisdiction:

> Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board . . . the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice.

29 U.S.C. § 159(c)(1).[10]

As noted above, *supra* at 11, this Circuit has held that disputes are within the primary jurisdiction of the NLRB when the Agency "is considering" or has "already decided" the matter. *Trafftech, Inc.*, 461 F.3d at 695. Here, the Agency began "considering" the question whether the Union should represent the Affinity nurses as soon as an election petition was filed with the Agency. Judge Learned Hand's reasoning in *Fay v. Douds*, 172 F.2d 720 (2d Cir. 1949), is instructive on this point. "[A]s soon as a union files a petition under Sec. 9(c)(1)(A)(i) . . . a single and continuing 'question of representation' is 'raised': i.e. whether [the union] shall be 'certified' as [the exclusive] representative . . ." *Id.* at 724. Thus, "the 'question of representation' is not to be divided into two parts: the preliminary 'investigation' to decide whether there shall be an election, and the election itself."

[10] Section 9 of the Act further provides that "[n]othing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board." 29 U.S.C. § 159(c)(4).

Id. at 723–24.[11] The illogic of Affinity's argument that the NLRB was not considering a representation question until the NLRB certified the election speaks for itself.

[11] Although the holding in *Fay* has been questioned on grounds not relevant here, *see NLRB v. Teamsters, Local 344*, 561 F.2d 31, 37 (7th Cir. 1977); *Utica Mut. Ins. Co. v. Vincent*, 375 F.2d 129, 134 (2d Cir. 1967), no court has questioned Judge Hand's commonsense understanding that an election petition raises a single unitary "question of representation."

CONCLUSION

For the forgoing reasons, the judgment of the District Court dismissing Appellant's complaint for lack of subject matter jurisdiction should be affirmed in its entirety.

Respectfully submitted,

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Dated at Washington, D.C.
This 27th day of January, 2017

CERTIFICATE OF COMPLIANCE

1. This document complies with the word limits of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) this document contains 3,861 words.

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This 27th day of January, 2017

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of January 2017, a copy of the foregoing brief of Amicus Curiae National Labor Relations Board was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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