

**UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MAINE**

Blethen Maine Newspapers, Inc., d/b/a)	
Portland Press Herald)	
)	
)	Civil Action No. 2:08-cv-00197-GZS
Plaintiff,)	
)	
v.)	
)	
)	
Portland Newspaper Guild, Local 31128)	
)	
Defendant.)	
_____)	

**DEFENDANT’S MOTION TO DISMISS PURSUANT TO F.R.Civ.P. 12(b)(1) WITH
INCORPORATED MEMORANDUM OF LAW**

NOW COMES Defendant, Portland Newspaper Guild, Local 31128 (hereinafter “the Union”), and hereby moves for dismissal of the Complaint pursuant to F.R.Civ.P. 12(b)(1), on the grounds that this Court has no jurisdiction over this dispute.

First, the dispute is within the exclusive jurisdiction of the National Labor Relations Board. Second, there is no jurisdiction under the Declaratory Judgment Act, in the absence of an actual case or controversy.

I. THIS ACTION IS WITHIN EXCLUSIVE JURISDICTION OF THE NATIONAL LABOR RELATIONS BOARD

Plaintiff alleges at Paragraphs 43 and 44 that

43. Specifically, when Plaintiff requested that the Union agree to a joint submission and an expedited arbitration, pursuant to Article X, sec. 4 (“expeditious resolution of grievances is in the best interest of both parties and the employees affected”) and Article X, sec. 5 (providing that the parties will try to expedite resolution of disputes), the Union refused.

44. This refusal to cooperate in the timely resolution of an urgent dispute of critical importance over the interpretation of the contract constitutes a breach of the 2007 Agreement by the Union. It also constitutes a breach of the Union's obligation to act in good faith and deal fairly with Plaintiff in the performance of its obligations under the 2007 Agreement.

The entire gravamen of the Complaint is that the Defendant Union, by failing to agree to expedite the arbitration of the Plaintiff's grievance, has violated its obligation to act in good faith and deal fairly with Plaintiff: such an allegation is squarely an allegation that the Union has "violated its obligation to bargain in good faith", in violation of the National Labor Relations Act ("NLRA"), since the obligation to bargain in good faith is only established under that law.

As this Court noted in *Roussell v. St. Joseph's Hospital*, 257 F. Supp. 2d 280; 2003 U.S. Dist. LEXIS 6121:

...[S]ection 8 of the NLRA makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [section 7 of the Act]." 29 U.S.C. § 158(a)(1); *Portland Airport Limousine*, 163 F.3d at 664. Pursuant to the Supreme Court's decision in *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 3 L. Ed. 2d 775, 79 S. Ct. 773 (1959), federal courts must defer to the exclusive competence of the National Labor Relations Board ("NLRB") when the employee activity is arguably protected by section 7 or prohibited by section 8 of the NLRA. *Tamburello v. Comm-Tract Corp.*, 67 F.3d 973, 976 (1st Cir. 1995).

The First Circuit's analysis in *Tamburello* is instructive:

The NLRA "is a comprehensive code passed by Congress to regulate labor relations in activities affecting interstate and foreign commerce." *Nash v. Florida Indus. Comm'n*, 389 U.S. 235, 238, 19 L. Ed. 2d 438, 88 S. Ct. 362 (1967). The NLRA reflects congressional intent to create a uniform, nationwide body of labor law interpreted by a centralized expert agency -- the National Labor Relations Board (NLRB). Accordingly, the NLRA vests the NLRB with primary jurisdiction over unfair labor practices. *See* 29 U.S.C. § 158. Applying these principles, the *Garmon* Court held that "when an activity is arguably subject to § 7 or § 8 of the [NLRA], the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the

danger of state interference with national policy is to be averted." *Garmon*, 359 U.S. at 245. The Court has interpreted this to mean that, "as a general rule, neither state nor federal courts *have jurisdiction* over suits directly involving 'activity [which] is arguably subject to § 7 or § 8 of the Act.'" *Vaca v. Sipes*, 386 U.S. 171, 17 L. Ed. 2d 842, 87 S. Ct. 903, (1967) (emphasis added; and quoting *Garmon*, 359 U.S. at 245). *See also Morgan v. Massachusetts General Hosp.*, 901 F.2d 186, 194 (1st Cir. 1990) ("as a general rule, the [NLRB] has 'exclusive jurisdiction to find, prevent, and rectify unfair labor practices'" (quoting *New Mexico Dist. Council of Carpenters, AFL-CIO v. Mayhew Co.*, 664 F.2d 215 (10th Cir. 1981); and collecting cases)). A primary justification of the preemption doctrine is "the need to avoid conflicting rules of substantive law in the labor relations area and the desirability of leaving the development of such rules to the administrative agency created by Congress for that purpose . . ." *Vaca*, 386 U.S. at 180-81.

The Union's alleged wrongful conduct in this case is arguably prohibited by the NLRA.

Section 8(b)(3) of the NLRA makes it unlawful for a Union to bargain in bad faith:

(b) Unfair labor practices by labor organization

It shall be an unfair labor practice for a labor organization or its agents...

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees... 29 U.S.C. § 158(b)(3).

The obligation to bargain in good faith is defined in §8(d) of the Act, which states:

(d) Obligation to bargain collectively

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment of the *negotiation of an agreement, or any question arising thereunder*,... but such obligation does not compel either party to agree to such a proposal or require the marking of a concession... (emphasis supplied) 29 U.S.C. §158(d)

The ultimate question presented by Plaintiff's claims is whether the Union's failure to agree to a more expedited grievance and arbitration process than that set forth in the CBA

constituted a violation of the Union's obligation to bargain in good faith, and hence constitutes a violation of the NLRA. Unless an exception applies, therefore, Plaintiff's claims are subject to the NLRB's primary jurisdiction.

The Circuit in *Tamburello* went on to discuss the exceptions:

There are three generally recognized exceptions to the NLRB's primary jurisdiction. The first is where Congress has expressly carved out an exception to the NLRB's primary jurisdiction. *Vaca*, 386 U.S. at 179-80 (citing cases); *Brennan v. Chestnut*, 973 F.2d 644, 646 (8th Cir. 1992)...

The second exception applies when the regulated activity touches "interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction," courts "could not infer that Congress had deprived the States of the power to act." *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 195, 56 L. Ed. 2d 209, 98 S. Ct. 1745 (1977) (quoting *Garmon* 359 U.S. at 244)...

The third exception holds that the NLRB's exclusive jurisdiction does not apply if the regulated activity is merely a peripheral or collateral concern of the labor laws. *Vaca*, 386 U.S. at 179-80; *Brennan*, 973 F.2d at 646. Under this exception, federal courts may decide labor questions that emerge as collateral issues in suits brought under statutes providing for independent federal remedies. *Connell Construction*, 421 U.S. at 626; *Britt v. Grocers Supply Co., Inc.*, 978 F.2d 1441, 1446 (5th Cir. 1992).

Here it is clear that none of the three exceptions apply, and the NLRB has primary and exclusive jurisdiction over the Union's alleged failure to bargain in good faith.

This Court has no jurisdiction over Plaintiff's claims and the Complaint must be dismissed.

II. THERE IS NO CASE OR CONTROVERSY UNDER THE DECLARATORY JUDGMENT ACT

The Declaratory Judgment Act, 28 U.S.C. §2201(a), creates a remedy in the U.S. District Court, but only in a "case of actual controversy within its jurisdiction." Where there is an "actual

controversy,” within the jurisdiction of the District Court, the Court “may declare the rights and other legal relations of any interested party seeking such declaration,” which declaration has the force and effect of the final judgment.

There is no actual controversy alleged before the Court. Essentially, Plaintiff seeks an advisory opinion from the Court as to whether, in the event it negotiates a sale or other transfer of its business to a buyer, that buyer must be bound by the terms and conditions of the Collective Bargaining Agreement in accordance with the “Duration and Renewal” clause of the CBA, referred to and quoted in Paragraph 34 of the Complaint.

The Complaint does not allege that there is a successor or assign of the Plaintiff (“Publisher”). In the event of a sale or other transfer of the operation to a successor or assign, it is very possible that such a successor or assign might be more than willing to adopt the terms and conditions of the CBA, in accordance with the obligations of the “Duration and Renewal” provision. In that case, there will be no issue to be determined by the Court.

In the absence of an actual buyer or transferee who refuses to allow the CBA to be binding upon it, in accordance with the “Duration and Renewal” provision of the CBA, there is no actual case or controversy.

This situation is much like that addressed by Judge Anderson of the U.S. District Court for the Central District of California in *Bolton, et al. v. Actuant Corporation, et al.*, 2004 U.S. Dist. LEXIS 15192. In that case, employees sought a determination from the Court that Actuant Corporation would still be liable to make pension payments, in the event that its successor, APW North America, failed to do so. Actuant had disclaimed any further responsibility to fund the plan, and the plaintiffs requested the declaration because “unless and

until this obligation of Actuant is confirmed, plaintiffs are unable to make informed decisions” regarding their continued participation in the funds.

Actuant moved to dismiss because there was no actual case or controversy, contending that the plaintiffs “were seeking an advisory opinion.”

The Court held that in order for there to be subject matter jurisdiction, the dispute must be “immediate, concrete; real, substantial” *Stewart v. MM&P Pensions*, 608 F.2d 776, 782 (9th Cir. 1979). There must be “a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment,” quoting *Maryland Casualty Company v. Pacific Coal and Oil Company*, 312 U.S. 270 (1941). It cannot be of a mere “hypothetical or abstract character” and the Court should not be issuing “an opinion advising what the law would be on a hypothetical state of facts.”

The Court went on to note that “what plaintiffs actually seek here is a determination as to the validity of one of Actuant’s potential defenses to a future breach of contract claim which plaintiffs would file *if* the APW entities ceased funding the plan and Actuant declines to make good on any shortfall.”

The Court noted that plaintiff’s claim, that they had “an immediate need for this court to remove uncertainty and insecurity from the legal relationship between plaintiffs and Actuant” did not make the declaration they sought any less advisory. Judge Hoffman concluded that “Declaratory Judgment Act does not empower this Court to render investment advice.” Nor does the Act empower the court to render advice to the Plaintiff with respect to its negotiation of sales or other transfers of its operation.

Since there is no current case or controversy, the Declaratory Judgment Act is not applicable and this Court has no jurisdiction.

WHEREFORE the Complaint should be dismissed.

Dated this 8th day of July 2008

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CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of Defendant's Motion to Dismiss Pursuant To F.R.Civ.P. 12(b)(1) With Incorporated Memorandum of Law dated July 8, 2008 on each of the parties via U.S. Mail, postage prepaid, on July 8, 2008:

Mark A. Hutcheson, Esq.
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All other parties listed on the Notice of Electronic Filing have been served electronically

Dated this 8th day of July 2008

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