

# United States Court of Appeals For the First Circuit

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No. 13-2057

NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, INC.,

Plaintiff, Appellant,

v.

NATIONAL EMERGENCY MEDICAL SERVICES ASSOCIATION, ET AL.,

Defendants, Appellees.

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Before

Torruella, Howard and Kayatta,  
Circuit Judges.

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## ORDER OF COURT

Entered: August 26, 2013

This dispute between two labor unions is the subject of pending arbitration proceedings before the American Arbitration Association in Modesto, California. That development is unsurprising: each union considers the other to be in breach of an "Affiliation Agreement" whereby, to simplify somewhat, "the only means of settlement of [Agreement-related] disputes" is binding arbitration. Agreement Article VII (Excerpts of Record (ER) 76). One union, the National Emergency Medical Services Association (NEMSA), demanded arbitration on May 1, 2013. It seeks both damages and "injunctive relie[f] restraining Respondent from raiding NEMSA's members." The other union, the National Association of Government Employees (NAGE), agreed (albeit on second thought) to arbitrate the legality of its own unilateral termination of the Agreement. (NAGE initially argued that the arbitrator lacks jurisdiction over these disputes because of NEMSA's material breach of the Agreement.) With the arbitrator this matter might have remained, where it evidently belongs by agreement of the parties; but circumstances have conspired to draw in the National Labor Relations Board and the federal courts as well. We are now being asked by NAGE to stay a preliminary injunction, entered last Friday, August 23, in the District of Massachusetts, pending

its appeal of that injunction.<sup>1</sup>

Having terminated the Agreement on April 8, 2013, NAGE resumed or continued doing what it had previously committed not to do: challenge NEMSA's status as the bargaining agent for the employees and bargaining units that NEMSA currently represents. Article II.C, V. (NAGE calls this the "non-compete" commitment.) Armed with the requisite showing of worker support, NAGE petitioned the Board to decertify NEMSA as the representative of workers at several sites where the collective bargaining agreements were due to expire. The petitions asked the Board to schedule and conduct representation elections to determine whether the workers now wish to be represented by NAGE, by NEMSA, another intervening union, or no union at all. NEMSA, for its part, urged the Board to suspend or delay the elections. This the Board refused to do because the Board "does not enforce private agreements" of that nature.

The first two elections are upon us. At AMR of New Haven, Connecticut, an on-site election is set for this Tuesday, August 27. (We are told that the ballots will be counted by the Board that same day.) The second, a mail ballot election at AMR of Riverside, California, began on August 16. Results will be tallied and announced on Friday, September 6.

So far as the record shows, NEMSA has not sought preliminary injunctive relief against NAGE in the arbitration that it demanded nearly four months ago, one might recall, precisely to obtain an injunction. There is even an unrebutted suggestion that NEMSA "acceded to a November [arbitration] date without any request for expedited relief o[f] any sort," such as "getting an arbitrator in quickly, a faster track or moving the arbitration with a little bit more alacrity." Docket No. 48, Tr. 4-5. (Apparently the arbitration hearing is now scheduled for October.) From the middle of June forward, NEMSA's strategy has been to seek preliminary relief in federal district court, where it is the defendant in NAGE's action for breach of the Affiliation Agreement. NEMSA argued that it will suffer irreparable harm unless NAGE is ordered to respect the "non-compete" (anti-raiding) commitment in the now-terminated Agreement. Otherwise, it is feared, NAGE's ongoing "attack on [NEMSA's] membership," goodwill, and other assets will render the arbitral process (when it finally occurs) an empty formality. (An arbitrator cannot for example order the Board to undo or redo an election if NAGE should win.) NEMSA asked the court to preserve the pre-termination status quo by ordering NAGE to withdraw its Board petitions to decertify NEMSA, and by enjoining NAGE from further acts of the same ilk directed toward the Board or NEMSA's members "until after the [arbitral] process has concluded." Summing up its position, NEMSA said that it "filed for this [preliminary] injunction seeking basically to preserve something, so there'll be something there to arbitrate about." Tr. 8.

The district court granted a preliminary injunction for the reasons set forth in the magistrate judge's Report & Recommendation. "Pending the outcome of any requests for preliminary relief submitted in arbitration proceedings between NAGE and NEMSA"--an important qualifier--the court ordered that "(1) NAGE shall be restrained and enjoined from participating in any election(s) in which it would be seeking to replace NEMSA or otherwise challenge NEMSA's status as the representative for any existing employees or bargaining units; (2) NAGE shall withdraw all pending petitions to decertify NEMSA as the

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<sup>1</sup>The stay is sought here in the first instance. We agree with NAGE that, "[g]iven the undeniable exigencies of this situation," moving first in the district court would be impracticable. See Fed. R. App. P. 8(a)(2)(A)(i).

representative of any existing bargaining units; and (3) NAGE shall be restrained and enjoined from pursuing further efforts to decertify NEMSA as the representative of any existing bargaining units." 8/23/13 Order at 1-2 (emphasis added). (Other aspects of the order will be discussed below.)

In the interest of time, we briefly set forth four points that the parties have not disputed about the order (and can therefore be assumed correct for now):

--This is a case "involving or growing out of a labor dispute." 29 U.S.C. § 101. It is accordingly subject to the interlocking provisions of the Norris-LaGuardia Act, "designed to curb the use of federal court injunctions" in such cases. Tejidos de Coamo, Inc. v. Int'l Ladies' Garment Workers' Union, 22 F.3d 8, 11 (1st Cir. 1994).

--The conduct enjoined by the district court--a set of activities meant to increase the union's membership and influence through representation elections--falls within the "unqualified 'no injunction' zone for the core [union] conduct of striking, organizing in unions, and picketing" that was created by section 4 of the Act. Tejidos, 22 F.3d at 14 (emphasis added). See 29 U.S.C. § 104 ("No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute . . . from doing" certain enumerated acts); AT & T Broadband, LLC v. Int'l Bhd. of Elec. Workers, 317 F.3d 758, 760 (7th Cir. 2003) (section 4 "is designed . . . to shout 'We really mean it!' for the activities at the core of union operations").

--The injunction here therefore must fit within a limitation upon "section 4's flat prohibition" that has been recognized by the Supreme Court. Tejidos, 22 F.3d at 12, 14. Whether the injunction does so in fact is, of course, disputed. The district court believed that NEMSA "had satisfied all the elements of a Boys Markets injunction," so named after a case where the Supreme Court upheld a federal court injunction to enjoin a strike that the union had called despite its contractual commitment to arbitrate grievances and refrain from strikes. R&R at 21-22 (citing Boys Markets, Inc. v. Retail Clerks Union, 398 U.S. 235 (1970)).

--Any Boys Markets injunction here must also satisfy the substantive and procedural requirements of section 7 of the Act. "[S]ection 7 imposes severe conditions on the grant of injunctive relief where it is not barred outright by section 4." Tejidos, 22 F.3d at 11 n.5. Peculiar to section 7, "[n]o court of the United States shall have jurisdiction to issue a temporary or permanent injunction" in this type of case "except after findings of fact by the court" that, among other things, "unlawful acts" be threatened; that "substantial and irreparable injury to complainant's property" will follow without an injunction; and that "public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection." 29 U.S.C. § 107. See Tejidos, 22 F.3d at 13, 14 n.11.<sup>2</sup> Nor may the court grant injunctive relief "except after hearing the testimony of witnesses in open court (with opportunity for cross-examination)," and "except on condition that complainant shall first file [bond] sufficient" to cover all loss (including attorney's fees). § 107.

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<sup>2</sup>Section 7 does not operate on a "generous" sliding scale whereby a "very strong or unanswerable" claim on the merits can compensate somewhat for a marginal showing as to irreparable injury. Tejidos, 22 F.3d at 15.

On top of these four working assumptions, which neither side contests, we make two working assumptions as to disputed issues, this time in favor of the injunction and NEMSA:

--A Boys Markets injunction may be appropriate in some cases of arbitrable jurisdictional disputes between unions--e.g., where one union's actions in advance of an election can be said to have frustrated the arbitral process and rendered the arbitration meaningless without a protective injunction. Cf. *Indep. Oil & Chem. Workers of Quincy, Inc. v. Procter & Gamble Mfg. Co.*, 864 F.2d 927, 931 (1st Cir. 1988). That possibility is to be explored case by case.<sup>3</sup> For now, we assume that an injunction that effectively narrows the worker's right to "designat[e] . . . representatives of his own choosing," one of the core concerns of the Act, 29 U.S.C. § 102, may nonetheless be permitted by the Act. (By their very nature, disputes over membership and representation can alter the dynamics of a union election.)

--Finally, NEMSA has demonstrated a sufficient likelihood of success on the merits for purposes of an application for a Boys Markets injunction in aid of arbitration. See R&R at 19 (NEMSA need only show that "the position [it] will espouse in arbitration" regarding NAGE's alleged breach of the Agreement "is sufficiently sound to prevent the arbitration from being a futile endeavor") (quoting *Local Lodge No. 1266, Int'l Ass'n of Machinists v. Panoramic Corp.*, 668 F.2d 276, 284-85 (7th Cir. 1981)). We remain to be persuaded on appeal that NEMSA's alleged material breach of the Agreement somehow relieved NAGE, as NAGE sees it, of its obligation to arbitrate these disputes before unilaterally terminating the Agreement.

On the assumptions we have made, we think that the preliminary injunction must be stayed pending appeal.<sup>4</sup> The Board's jurisdiction to hold elections has already been engaged; NAGE has been placed on the ballot; and the workers in question are free to designate NAGE as their representative, whatever they may think of the jurisdictional dispute between their suitors. A Boys Markets injunction at this point (if available) must be supported by the all-important section 7 finding of irreparable injury.<sup>5</sup> Irreparable injury

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<sup>3</sup>Cf. *Local No. 1547, Int'l Bhd. of Elec. Workers, AFL-CIO v. Local No. 959, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers, Indep.*, 507 F.2d 872, 877 (9th Cir. 1974) (agreeing that district court "lacked jurisdiction to grant specific enforcement of the no-raid agreement after the NLRB had ordered an election," but stopping short of "hold[ing] that a no-raid agreement is never enforceable by a district court"); *Amalgamated Transit Union AFL-CIO-CLC v. Int'l Bhd. of Teamsters*, 2006 WL 211812, at \*5 (N.D. Ill. Jan. 24, 2006) (espousing an "ad hoc" approach to the use of injunctions to enforce no-raid agreements). But cf. *AFSCME v. United Domestic Workers of Am.*, 2005 WL 2128979, at \*7 (S.D. Cal. Aug. 9, 2005) (denying injunctive relief as barred by the Act where "Plaintiffs seek to enjoin [the rival union's] organizing efforts to maintain the status quo pending arbitration regarding [the rival's] alleged breach of contract").

<sup>4</sup>"In essence, the issuance of a stay depends on whether the harm caused [movant] without the [stay], in light of the [movant's] likelihood of eventual success on the merits, outweighs the harm the [stay] will cause [the non-moving party]." *Acevedo-Garcia v. Vera-Monroig*, 296 F.3d 13, 16-17 (1st Cir. 2002) (citation and internal quotation marks omitted).

<sup>5</sup>NAGE argues that the district court "failed to abide the procedural requirements of NLA § 7, including the requirements that the court hold an evidentiary hearing, make specified findings of fact, and require the party seeking the injunction to post bond of a certain type." Motion for a Stay at 3. We are less

in this context may well include a showing that expedited or preliminary relief is unavailable from the arbitrator. The exhaustion of alternative remedies is equally implicated as an equitable factor. If the goal of a Boys Markets injunction is to aid the arbitration, the party seeking the injunction has an obligation to show that the arbitrator needs the extraordinary help.

When the district court (through its magistrate judge) considered this issue in the middle of July, it observed that "[t]o date, no arbitrator has been selected" and that "even if NEMSA ultimately prevails in the arbitration proceedings, it will not be able to obtain relief from the arbitrator in time to derail NAGE's efforts to have it decertified or to challenge it in the . . . upcoming elections." R&R at 8. Yet the court also found it "undisputed that once an arbitrator is selected in the instant case, the arbitrator would have authority to consider granting preliminary relief." R&R at 15. "However, the record is clear that the issue will not be presented to and resolved by an arbitrator prior to the upcoming elections." Id. An arbitrator was in fact selected on August 12, eleven days before the district court entered the injunction. The arbitrator was apparently available on certain dates in August but the attorneys for NAGE were not. The matter has been put off until October. ER 169. These facts were brought to the court's attention by NEMSA, but the court did not discuss them.

NAGE has asserted that NEMSA "took no steps to expedite the arbitration process." Objection to R&R at 8. This is an area for potential exploration on appeal. Our first look suggests that NEMSA made no request for preliminary relief and no documented effort to expedite a hearing that potentially could have been held before the elections in question. If the district court (section 7 aside) can grant preliminary relief without an evidentiary hearing because the essential facts "are not in dispute," Order at 2, so might have the arbitrator. As it is, we have the incongruity of a labor injunction "[p]ending the outcome of any requests for preliminary relief submitted in arbitration proceedings between NAGE and NEMSA," Order at 1, but no such request.

We recognize that the district court acted under time pressure created, it seems fair to say, jointly by the parties. NAGE cannot claim to have been cooperative in the arbitral process. Neither side has a particularly strong incentive to speed up the arbitration--NEMSA because it has a federal court injunction in hand, and NAGE because its Norris-LaGuardia shield is proof only against the courts. But for the moment, the balance of harms tips in favor of NAGE, which cannot run in the elections unless the injunction is stayed. NEMSA can run in all events.

The motion for a stay of the injunction pending appeal is allowed. The parties are invited to submit an agreed-upon schedule for expedited consideration.

By the Court:

/s/ Margaret Carter, Clerk.

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concerned for the moment with section 7 irregularities that would arguably be harmless or curable, such as the lack of a bond.

cc:

Richard Barry, Jr.  
Tanaz Moghadam  
Charles Ogletree, Jr.  
Andrew Roth  
Joshua Shiffrin  
Jean Zeiler  
John Connelly

Rob Farrell, Clerk, USDC-MABO  
Honorable Joseph L. Tauro