No. 08-1214

IN THE
Supreme Court of the United States

GRANITE ROCK COMPANY,
Petitioner,
v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS & TEAMSTERS LOCAL 287,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations is a federation of 57 national and international labor organizations with a total membership of 11.5 million working men and women.[1] The instant case presents two important questions regarding the judicial authority under § 301 of the Labor Management Relations Act to: i) order arbitration of disputes arising under labor con-

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus*, made a monetary contribution to the preparation or submission of this brief.

tracts; and ii) entertain legal claims of a noncontractual nature arising out of labor disputes. The AFL-CIO has frequently filed briefs in cases before this Court that concern the scope of judicial authority to resolve labor disputes, most recently in *Union Pacific Railroad Co. v. Broth. of Locomotive Engineers & Trainmen Gen. Comm. of Adj., Cent. Reg.,* No. 08-604.

STATEMENT

The instant case arises out of a labor dispute between the Granite Rock Company and Teamsters Local 287 in connection with those parties' negotiations over a collective bargaining agreement to succeed the agreement covering approximately two dozen cement truck drivers employed at the Company's San Jose, California, plant that expired on April 30, 2004. *Teamsters Local 287 (Granite Rock)*, 347 NLRB 339, 341-42 (2006), *enf'd*, 293 Fed. Appx. 518 (9th Cir. 2008).[2]

Granite Rock filed suit under § 301 of the Labor Management Relations Act alleging that Local 287 ratified and entered into a successor collective bargaining agreement on July 2, 2004, and breached the no-strike clause in that agreement by thereafter resuming its strike against the Company. JA 310-11 ¶s 20 & 23, 317 ¶ 41. Granite Rock's LMRA § 301 lawsuit also alleged that the International Brotherhood of Teamsters ("IBT") – the national labor organization with which Local 287 is affiliated – tortiously interfered with the successor collective bargaining agreement by encouraging and supporting

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[2] The facts concerning the labor dispute are described in the comprehensive report of the National Labor Relations Board Administrative Law Judge issued after a two-day trial on Granite Rock's unfair labor practice charges against Local 287. *Teamsters Local 287*, 347 NLRB at 341-44.

the continuation of Local 287's strike. JA 318-19 ¶s 43-49. In the decision below, the Ninth Circuit ordered arbitration of Granite Rock's breach of contract claim against Local 287 under the grievance-arbitration provisions of the successor collective bargaining agreement and dismissed the tortious interference with contract claim against the IBT on the ground that it failed to state a claim under LMRA § 301. JA 61.

I. THE UNDERLYING LABOR DISPUTE.

The Granite Rock Company is engaged in the manufacture and supply of concrete for commercial use, operating out of 22 facilities located throughout northern California. JA 45; *Teamsters Local 287*, 347 NLRB at 341-42. The Company is a party to numerous collective bargaining agreements with various labor organizations, including agreements with four separate Teamsters locals. Pet. Br. 2; *Teamsters Local 287*, 347 NLRB at 342. All of the agreements contain similar no-strike clauses, generally prohibiting strikes during the term of the agreement but allowing covered employees to honor lawful picket lines at Granite Rock facilities established by employees not covered by the agreement, provided that the picket lines support union-sanctioned strikes that have been in effect for at least 15 working days. *Ibid*.

On March 23, 2004, Granite Rock and Local 287 commenced negotiations over a collective bargaining agreement to succeed the agreement that would expire on April 30. *Teamsters Local 287*, 347 NLRB at 341. Local 287 began a strike to support its bargaining position in early June. JA 45. Various other unions representing Granite Rock employees, including other Teamsters locals, honored Local 287's picket lines. 347 NLRB at 343 n. 4.

Early on the morning of July 2, Granite Rock and Local 287 reached a tentative agreement on the terms of a successor collective bargaining agreement. *Teamsters Local 287*, 347 NLRB at 343. Immediately after Granite Rock and Local 287 reached a tentative agreement on the successor collective bargaining agreement, the Company and the Local began discussing a back-to-work agreement resolving disputes growing out of the strike. *Ibid.* Local 287 wanted the back-to-work agreement to cover the employees and unions at other Granite Rock facilities who had honored Local 287's picket lines. *Id.* at 343-44. Granite Rock wanted the back-to-work agreement to be limited to employees at the San Jose facility represented by Local 287. *Ibid.* When the parties were unable to resolve their dispute over the scope of the back-to-work agreement, Local 287 resumed its strike. *Ibid.*

The Local 287 membership met later on the morning of July 2 to consider the tentative collective bargaining agreement. *Teamsters Local 287*, 347 NLRB at 343. Local 287 maintains that the membership did not vote on ratifying the agreement at that meeting but rather voted only on a particular part of the proposal that was controversial. *Ibid.* Granite Rock maintains that the Local 287 membership did vote to ratify the tentative agreement at the July 2 meeting. JA 310-11 ¶ 20. Both the Company and the Local agree that the tentative agreement would become effective only upon ratification by the Local 287 membership. JA 377 ¶ 16.

On August 22, 2004, the Local 287 membership voted to ratify the tentative agreement. JA 313 ¶ 27.[3] Granite Rock and Local 287 formally executed

[3] In the meantime, the collective bargaining agreement covering Granite Rock employees at the Company's San Benito

the collective bargaining agreement in December 2004. JA 448. By its terms, the agreement was in effect from May 1, 2004 until April 30, 2008. *Ibid.* The 2004-2008 agreement contained grievance-arbitration and no-strike provisions that, in all material respects, were identical to those contained in the predecessor agreement. JA 310 ¶ 18.

II. THE UNFAIR LABOR PRACTICE CASE.

On July 8, 2004, Granite Rock filed charges with the National Labor Relations Board alleging that Local 287 had violated § 8(b)(3) of the National Labor Relations Act by refusing to hold a ratification vote on the tentative collective bargaining agreement until the Company accepted the Local's proposed back-to-work agreement protecting employees and unions in other bargaining units who had honored Local 287's picket lines. *Teamsters Local 287*, 347 NLRB at 343-44. The General Counsel issued a complaint based on the Company's charges alleging that Local 287 had failed to bargain in good faith. *Id.* at 341. The General Counsel argued that the Local's refusal to hold a July 2 ratification vote was an unfair labor practice *both* because the parties had reached a tentative agreement subject to the single condition that it be ratified *and* because the demand to protect employees and unions in other bargaining units was not a mandatory subject of bargaining as it did not concern the terms and conditions of employment in the San Jose bargaining unit. *Id.* at 345.

After a two-day trial, in which Granite Rock participated, the NLRB Administrative Law Judge found that the tentative agreement had *not* been

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quarry had expired on July 15. *Teamsters Local 287*, 347 NLRB at 342, 344. The Local 287 membership remained away from work until September 13, honoring the quarry workers' picket lines. *Id.* at 344.

ratified on July 2. *Teamsters Local 287*, 347 NLRB at 341, 343. Rather, the ALJ found that the agreement was first ratified on August 22. *Id.* at 344. Nevertheless, the ALJ concluded that the delay in holding the ratification vote was an unfair labor practice, because the parties had reached agreement subject to the single condition of ratification by the Local 287 membership and the Local had a duty to conduct the ratification vote in a timely manner. *Ibid.* The ALJ recommended that Local 287 be ordered to cease and desist from refusing to bargain with Granite Rock by unduly delaying the submission of the tentative agreement for ratification. *Id.* at 346.

The NLRB adopted the ALJ's findings and conclusion. *Teamsters Local 287*, 347 NLRB at 339. The Board modified the ALJ's recommended remedy by ordering Local 287 to "make the contract effective as of July 2" on the ground that, "[b]ut for the unlawful failure to submit the contract for ratification on July 2, the employees would have ratified it on that date (as they did at the ratification vote of August 22)." *Ibid.*

III. THE INSTANT LMRA § 301 LAWSUIT.

On July 9, 2004, Granite Rock filed an LMRA § 301 suit against Local 287 alleging that the parties had entered into a new collective bargaining agreement on July 2 and that the Local's strike after that date breached the agreement's no-strike clause. JA 62-69. *See also* JA 70-79 (First Amended Complaint filed on July 22). On July 26, the District Court held a hearing on the Company's request for a preliminary injunction against the strike. JA 212-13. The Court advanced the trial on the merits to that date, and finding that Local 287 had not ratified the tentative agreement on July 2, entered judgment dismissing

the complaint. *Ibid.*

On January 24, 2005, the District Court granted Granite Rock's motion for a new trial based on new evidence concerning Local 287's July 2 membership meeting. JA 225. Local 287 then filed an answer on February 17, 2005, raising as an affirmative defense that Granite Rock's breach of contract claim "is subject to the grievance and arbitration provisions of the collective bargaining agreement *now in effect* between the parties." Teamsters Local 287 Brief 5 (quoting Answer, Dk. No. 48; emphasis added). *See* JA 347 ("presents a dispute subject to the grievance and arbitration provisions of the CBA presently in effect between the parties"). The Local thereafter moved to compel arbitration of Granite Rock's breach of contract claim. JA 226, 343. The District Court refused to compel arbitration on the ground that to order arbitration the Court would have to first find that the agreement had been ratified on July 2. JA 360-61. In the Spring of 2007, the District Court held a jury trial confined to the single issue of when the agreement had been ratified. JA 378-80. Based on the jury's finding that the new collective bargaining agreement had been ratified on July 2, the District Court then ordered arbitration of the remaining elements of Granite Rock's claim that continuation of the strike after that date violated the agreement's no-strike clause. JA 381-82.

In the meantime, on February 17, 2006, Granite Rock filed a Second Amended Complaint. JA 249-258. The Second Amended Complaint realleged the breach of contract claim against Local 287. *Ibid.* The Second Amended Complaint added the IBT as a defendant along with Local 287 to the breach of contract claim alleging that "Defendant IBT and Defendant Local 287 were in an agency relationship at all

times hereto in which the IBT exerted actual control over Local 287." JA 256 ¶ 18.

The IBT moved to dismiss the breach of contract claim against it on the ground that it was not a party to the agreement. At the hearing on that motion, Granite Rock's attorney explained that the breach of contract claim against the IBT was premised on the theory that Local 287 had negotiated the agreement on behalf of the IBT as an undisclosed principal. JA 281, 289. The District Court noted that this ground for finding the IBT to be a party to the collective bargaining agreement had not been sufficiently alleged and warned the Company attorney that if he re-alleged that claim without sufficient factual basis, the Court would sanction him under Rule 11. JA 281-82. The Company attorney then suggested that he also wished to present an alternative claim against the IBT of interference with contract based on the premise that the IBT was not a party to the agreement. JA 290-91. On May 23, 2006, the District Court dismissed the claim that the IBT had violated the agreement and expressly declined to address whether LMRA § 301 would support a tortious interference claim. JA 303.

On June 8, 2006, Granite Rock filed its Third Amended Complaint. JA 304-21. The First Claim for Relief stated in the Third Amended Complaint was for "Breach of Contract Against Defendant Local 287." JA 316-17. The Second Claim for Relief was for "Interference/Inducement of Breach of Contract Against Defendant IBT." JA 317-18. The Third Amended Complaint did not allege that the IBT had itself breached the collective bargaining agreement but instead alleged that "Defendant IBT induced Local 287 to violate its promises to, and/or to breach its Agreement with Plaintiff" and did so "maliciously

with intent to interfere with the Agreement." JA 318 ¶s 44 & 46. On October 5, 2006, the District Court dismissed the tortious interference claim against the IBT on the ground that LMRA §301 does not support such a claim. JA 332. On December 13, 2006, the Court granted the Company's request to certify the dismissal of the tortious interference claim for immediate appeal on the grounds that this claim was "legally and factually severable" from the remaining breach of contract claim against Local 287. JA 338.

On consolidated appeals, the Ninth Circuit reversed the District Court's denial of Local 287's original motion to compel arbitration of all elements of Granite Rock's entire breach of contract claim against the Local, including the dispute over the date of ratification, finding that "both parties consented to arbitration." JA 60. In addition, the Court of Appeals affirmed the District Court's dismissal of Granite Rock's claim against the IBT on the ground that LMRA § 301 does not provide a cause of action against a nonparty for inducing a party to breach its collective bargaining agreement. JA 49.

SUMMARY OF ARGUMENT

The complaint filed by Granite Rock under § 301 of the Labor Management Relations Act contains two distinct claims, each brought against a different defendant. The first claim is for "Breach of Contract Against Defendant Local 287." JA 316. The second claim is for "Interference/Inducement of Breach of Contract Against Defendant IBT." JA 317. Teamsters Local 287 is the union party to a collective bargaining agreement with Granite Rock. The International Brotherhood of Teamsters (IBT) does not have any contractual relationship with Granite Rock.

I. The 2004-2008 collective bargaining agreement between Granite Rock and Local 287 provides that

"[a]ll disputes arising under this agreement shall be resolved in accordance with the [contractual grievance-arbitration] procedure." JA 434. Granite Rock's breach of contract claim against Local 287 – that the Local breached the collective bargaining agreement's no-strike clause by resuming a strike on July 2, 2004 – is a "dispute[] arising under th[e] agreement" and is therefore the type of dispute that the parties agreed to submit to arbitration.

Whether the Local's post-July 2, 2004, strike breached the no-strike clause in the 2004-2008 collective bargaining agreement turns on whether the agreement was ratified on July 2, 2004, as Granite Rock maintains, or on August 22, 2004, as the Local maintains. The dispute over the ratification date has nothing to do with whether the dispute is subject to arbitration, because either way the entire agreement, including its arbitration clause, was ratified before Local 287 responded to Granite Rock's complaint in February 2005 by moving to compel arbitration of the Company's breach of contract claim. The Ninth Circuit, therefore, correctly ordered arbitration of Granite Rock's breach of contract claim against Local 287 without itself resolving the dispute over the ratification date.

II. Granite Rock's claim for "Interference/Inducement of Breach of Contract Against Defendant IBT," JA 317, does not allege a breach of contract by the IBT itself. The IBT is not a party to the Granite Rock/Local 287 collective bargaining agreement and has not assumed any obligations under that agreement. Granite Rock's claim against the IBT is for tortious interference by a nonparty with a party's performance of its contract.

LMRA § 301 provides for breach of contract suits seeking to enforce contractual obligations created by

collective bargaining agreements. Section 301 does not provide for the creation of a federal common law of tortious interference with collective bargaining agreements. To the extent that the common law at one time did provide for such tort claims in regard to labor disputes that body of law has been superseded by the National Labor Relations Act, which is administered and enforced by the National Labor Relations Board.

ARGUMENT

I. GRANITE ROCK WAS PROPERLY ORDERED TO ARBITRATE ITS BREACH OF CONTRACT CLAIM AGAINST LOCAL 287.

Granite Rock's LMRA § 301 claim against Local 287 asserts a breach of the no-strike provision contained in the parties' 2004-2008 collective bargaining agreement. JA 316-17. In this regard, Granite Rock alleges:

> i) that "[t]he Agreement to which both Plaintiff and Defendant Local 287 were parties, contained an express no-strike provision and a mandatory grievance procedure and existed as of July 2, 2004," JA 316-17 ¶ 38; and
>
> ii) that "Defendant Local 287 breached the Agreement by continuing [after July 2, 2004] to engage in a strike that violated the no-strike provision of the Agreement," JA 317 ¶ 39.

Local 287's answer to the Company's complaint raised two defenses: first, that the agreement was not ratified – and thus did not go into effect for purposes of the no-strike clause – until August 22, 2004; and second, that Granite Rock's breach of contract claim "is subject to the grievance and arbitration provisions of the collective bargaining agreement

now in effect between the parties." Teamsters Local 287 Brief 5 (quoting Answer, Dk. No. 48; emphasis added). *See* JA 346-47. Finding that "both parties have consented to arbitration," the Ninth Circuit held that "Granite Rock's claims against Local 287 should have been dismissed in favor of arbitration." JA 61.

A. Granite Rock maintains that the Court of Appeals erred in ordering arbitration without itself resolving the dispute between the Company and Local 287 over exactly when in 2004 the new collective bargaining agreement was ratified. Pet. 18-19. Granite Rock argues, in this regard, that "the federal court, not the arbitrator, has the authority to determine whether a binding contract containing an arbitration provision was initially formed." Pet. Br. 15 (capitalization omitted). However, there is no dispute that a "binding contract containing an arbitration provision" was formed at some point in 2004, well before Local 287 moved to compel arbitration of Granite Rock's breach of contract claim under the new agreement. The dispute over exactly when the agreement was formed thus has nothing to do with the arbitrability of Granite Rock's claim under the agreement and goes entirely to the merits of that claim.

The "grievance and arbitration provisions of the [2004-2008] CBA" were "presently in effect" at the time Local 287 answered Granite Rock's complaint and moved to compel arbitration. JA 347. The 2004-2008 collective bargaining agreement was ratified by Local 287 no later than August 22, 2004 and was formally executed by the parties in December 2004. JA 313 ¶ 27, 448. By its terms, the new agreement was in effect from May 1, 2004, the day after the old agreement expired. JA 448. Thus, the collective

bargaining agreement, including the commitment to handle all disputes under the agreement through its grievance-arbitration procedures, was indisputably in effect in early 2005, when Local 287 responded to Granite Rock's complaint by moving for arbitration of the breach of contract claim. JA 229.

The 2004-2008 collective bargaining agreement between Granite Rock and Local 287 provides – as did the parties' previous collective bargaining agreements – that "[a]ll disputes arising under this agreement shall be resolved in accordance with the [contractual grievance-arbitration] procedure." JA 434. The agreement further provides that a "dispute [may be] referred to arbitration by either party" and that "the Arbitrator shall be either Franklin Silver or another Arbitrator mutually agreed upon by both parties." JA 435.

There is no question that Granite Rock's claim that Local 287 breached the no-strike clause of the 2004-2008 collective bargaining agreement presents a "dispute[] arising under this agreement." JA 434. The Company's claim rests entirely on the premise that the Local had a contractual obligation under that agreement not to continue its strike after July 2, 2004. Thus, the sole question presented by Granite Rock's breach of contract claim against Local 287 is whether the continuation of the strike after July 2 violated the agreement.

Given all this, the Court of Appeals was plainly right to order arbitration of Granite Rock's breach of contract claim against Local 287 without first resolving the dispute over the exact date of ratification.

B. For the most part, Granite Rock's argument to the contrary rests on nothing more than a sleight of hand. The Company notes – correctly – that "Local 287 disputed that the Agreement was formed" on

July 2, 2004, but then adds – deceptively – that "Local 287 continues to claim that the Company's employees never ratified the Agreement." Pet. Br. 22. Based on that characterization of the Local's position, Granite Rock argues that the dispute over the exact ratification date of the 2004-2008 collective bargaining agreement raises a "question[] about the existence . . . of an arbitration agreement [that] must be decided initially by the courts." Pet. Br. 15.

However, Local 287 does *not* claim that the Local membership *never* ratified the 2004-2008 agreement. To the contrary, the Local's motion to send Granite Rock's breach on contract claim to arbitration expressly invoked "the grievance and arbitration provisions of the CBA *presently in effect* between the parties." JA 347 (emphasis added). *See also* Teamsters Local 287 Brief 5 (quoting Answer).

The only dispute regarding ratification of the collective bargaining agreement is over whether the agreement was ratified on July 2, as Granite Rock asserts, or on August 22, as Local 287 asserts. But that dispute has nothing to do with "the existence . . . of an arbitration agreement," Pet. Br. 15, at the time Local 287 moved to compel arbitration. By that time, the parties had indisputably consummated the 2004-2008 collective bargaining agreement containing an express commitment to resolve all disputes arising under that agreement through arbitration.

Nor is there any question for judicial resolution regarding the "scope of [that] arbitration agreement." Pet. Br. 15. The grievance-arbitration provision in the 2004-2008 collective bargaining agreement covers "[a]ll disputes arising under this agreement" and provides that a "dispute [may be] referred to arbitration by either party." JA 434-35. Thus, Granite Rock's claim that Local 287 violated the 2004-2008

agreement by continuing its strike beyond July 2 was most certainly within the scope of the arbitration agreement.

C. The dispute between Granite Rock and Local 287 over whether the collective bargaining agreement was ratified on July 2, 2004, or August 22, 2004 concerns the substantive application of the agreement – i.e., did the agreement's no-strike clause cover the post-July 2 strike action – and thus goes to the merits of the Company's claim that the post-July 2 strike action breached the agreement. Because the 2004-2008 collective bargaining agreement was clearly in effect by the time Local 287 moved to compel arbitration of the Granite Rock's breach of contract claim, the dispute over the exact ratification date does not raise any "question of arbitrability" to be decided by a court.

The "questions of arbitrability" that must be decided by a court arise in the "narrow circumstances . . . where reference of [a] gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83-84 (2002). Thus, "gateway" arbitrability issues concern matters such as "whether the parties are bound by a given arbitration clause" and "whether an arbitration clause in a concededly binding contract applies to a particular type of controversy." *Howsam*, 537 U.S. at 83-84. As Professor Archibald Cox observed in a seminal law review article on labor arbitration, "giving the court the duty to determine whether the claim which one side wishes to arbitrate gives rise to a dispute concerning the 'interpretation and application' of the collective-bargaining agreement" ensures that "the arbitrator [does not have] unlimited power to determine his own jurisdiction"

and grants each party "the right to a judicial determination upon whether the arbitrator has jurisdiction over the subject matter" while leaving "all other questions – procedural, jurisdictional or substantive – . . . solely within the power of the arbitrator to determine." Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1509-11 (1959).[4]

In determining whether "the arbitrator has jurisdiction over the subject matter" of a dispute, Cox, 72 Harv. L. Rev. at 1511, – i.e., "whether an arbitration clause in a concededly binding contract applies to a particular type of controversy," *Howsam*, 537 U.S. at 84 – "a court is not to rule on the potential merits of the underlying claims," *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 649 (1986). There is "a presumption of arbitrability in the sense that '[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute," and all "[d]oubts should be resolved in favor of coverage.'" *Id*. at 650, quoting *Warrior & Gulf*, 363

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[4] Professor Cox's views in this regard were cited by this Court in *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960), as the sole authority for the statement that "the question of arbitrability is for the courts to decide." *Id.* at 583 n. 7 citing 72 Harv. L. Rev. at 1508-09. And, the *AT&T Technologies* Court quoted at length from Professor Cox's article to explain why "[t]he willingness of parties to enter into agreements that provide for arbitration of specified disputes would be 'drastically reduced' . . . if a labor arbitrator had the 'power to determine his own jurisdiction.'" 475 U.S. at 651 quoting 72 Harv. L. Rev. at 1509. *See also First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 945 (1995), citing 72 Harv. L. Rev. at 1508-09.

U.S. at 582-583.[5]

Given the foregoing, the question of whether the collective bargaining agreement was ratified on July 2, 2004, or on August 22, 2004, is not a "question of arbitrability" for a court to decide. The arbitrator designated in the Granite Rock and Local 287 in their collective bargaining agreement clearly has "subject matter jurisdiction" over a claim that the Local violated the agreement's no-strike clause, because this is the "type of controversy" the parties agreed to arbitrate. The question of whether the no-strike clause had gone into effect at the time of the strike goes to "the potential merits of the underlying claims." *AT&T Technologies*, 475 U.S. at 649.

In sum, "[s]ince [Granite Rock's] claim is based upon breach of the collective bargaining agreement, [it] is bound by terms of that agreement which govern the manner in which contractual rights may be enforced." *Vaca v. Sipes*, 386 U.S. 171, 184 (1967), citing *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965). By granting Local 287's motion to compel arbitration of Granite Rock's breach of contract claim, the Ninth Circuit "simply remit[ted] the company to the forum it agreed to use for processing its strike damage claims." *Drake Bakeries v. Bakery Workers*, 370 U.S. 254, 266 (1962).

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[5] In *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190, 209 (1991), this Court refused to "apply th[e] presumption [of arbitrability] wholesale in the context of an expired bargaining agreement, [because] to do so would make limitless the contractual obligation to arbitrate." At the same time, however, the Court made clear that the "presumption of arbitrability" would apply fully "where an effective bargaining agreement exists between the parties, and the agreement contains a broad arbitration clause." *Ibid.* Here "an effective bargaining agreement [containing a broad arbitration clause] exists between the parties," and thus the "presumption of arbitrability" fully applies.

II. LMRA § 301 DOES NOT PROVIDE A CAUSE OF ACTION AGAINST A NON-PARTY TO A LABOR CONTRACT FOR INDUCING A PARTY'S BREACH OF THAT CONTRACT.

Granite Rock's sole LMRA § 301 claim against the International Brotherhood of Teamsters ("IBT") – "a non-signatory to Granite Rock and Local 287's labor contract," Pet. Br. 31, which "agreement did not mention IBT, and did not govern any rights or duties of IBT," JA 49 – is for "interference/inducement of breach of contract." JA 317 (Second Claim for Relief; capitalization omitted).[6] To make out that claim, Granite Rock alleged that the IBT "induced Defendant Local 287 to violate its promises to, and/or to breach its Agreement with [Granite Rock]" and did so "maliciously with intent to interfere with the Agreement" for the ultimate purpose of "put[ting] pressure on [Granite Rock] to agree to a Back to Work Agreement that included hold-harmless provisions that would protect Defendant IBT, Local 287 and the Teamsters Locals . . . from liability for their actions related to the unlawful strike." JA 318 ¶s 44-46.

What Granite Rock thus pled as an LMRA § 301 claim against the IBT was the common law tort of "intentionally and improperly interfer[ring] with the

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[6] The "interference/inducement of breach of contract" claim against the IBT was first pled in Granite Rock's Third Amended Complaint. JA 317-19. The Company's Second Amended Complaint had pled a breach of contract claim against the IBT on the theory that Local 287 had entered into the collective bargaining agreement with Granite Rock as an agent of the IBT. JA 255-56 ¶ 18. Granite Rock abandoned the breach of contract claim against the IBT after the District Court warned the Company's attorney that he would be subject to sanctions under Rule 11 if he realleged that claim without adequate factual basis. *See* JA 281-82.

performance of a contract . . . between another and a third person by inducing . . . the third person not to perform the contract." *Restatement (Second) of Torts* § 766 (1979). The courts below held that Granite Rock's "claim [against the IBT] for tortious interference cannot be said to 'arise under' the new CBA between Granite Rock and Local 28" and thus does not state an actionable § 301 claim. JA 49. As we now show, that holding is clearly correct.

A. Section 301 provides for "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . ." 29 U.S.C. § 185(a). "By its terms, this provision confers federal subject-matter jurisdiction only over '[s]uits for violation of contracts'" and does not confer federal jurisdiction over every suit that somehow "concerns a violation of contract." *Textron Lycoming Reciprocating Engine Div., Avco Corp. v. Automobile Workers*, 523 U.S. 653, 656 (1998).

A critical dividing line between suits within § 301's scope and those outside its scope is the line between suits to enforce contractual obligations and suits to enforce noncontractual legal obligations. "'Suits for violation of contracts' under § 301(a) are . . . suits that claim a contract has been violated." *Textron*, 523 U.S. at 657. Precisely because "a contract cannot bind a nonparty," *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002), it follows that "only a party to a contract can violate that contract" and "that a suit against a nonsignatory of a contract cannot be considered a suit for violation of the contract," *International Union, UMWA v. Covenant Coal Corp.*, 977 F.2d 895, 897 (4th Cir. 1992).

By its terms, then, "section 301 is . . . a grant of jurisdiction only to enforce contracts," *Brazinski v. Amoco Petroleum Additives Co.*, 6 F.3d 1176, 1180

(7th Cir. 1993), and "does not provide the basis for an LMRA claim *against* a nonparty to the underlying collective bargaining agreement," *Loss v. Blankenship*, 673 F.2d 942, 946 (7th Cir. 1982) (emphasis in original). Section 301's text is thus carefully calibrated to achieve Congress' goal of "mak[ing] collective-bargaining contracts equally binding and enforceable on both *parties*." S.Rep. No. 105, 80th Cong., 1st Sess. 15 (1947) (emphasis added). *See also id.* at 15 ("binding on both parties," "mutually binding on both parties to the contract"), 16 ("promote industrial peace through faithful performance by the parties"), 17 ("promote a higher degree of responsibility upon the parties to such agreements"); H.R.Rep. No. 245, 80th Cong., 1st Sess. 45-46 (1947) ("actions and proceedings involving violations of contract between employers and labor organizations may be brought by either party").

The long and the short of the matter is that Granite Rock's "interference/inducement of breach of contract" claim against the IBT does not rest on any alleged "violation of contract[]" *by the IBT*. Rather, that claim rests on the theory that the IBT violated some noncontractual legal obligation derived from some source other than the collective bargaining agreement in question. The courts below correctly concluded that the LMRA § 301 grant to the federal courts of jurisdiction over "suits for violation of contracts" does not grant jurisdiction over suits for violations of noncontractual legal obligations.

B. To be sure, "Section 301 authorizes federal courts to fashion a body of federal law for the enforcement of collective bargaining agreements." *Lewis v. Benedict Coal Corp.*, 361 U.S. 459, 471 (1960), citing *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957). But "[t]he common law to be made

is a common law of contracts, not a source of independent rights, let alone tort rights," *Brazinski*, 6 F.3d at 1180, for "section 301 creates a right of action only for breach of a collective bargaining agreement; it is not a tort statute," *Kimbro v. Pepsico, Inc.*, 215 F.3d 723, 727 (7th Cir. 2000).

That point is dispositive, because a claim against a nonparty to a contract for inducing a party's breach of the contract is, as a matter of basic legal principles, not a contract claim at all but a particular kind of tort claim, i.e., a claim for "intentionally and improperly interfer[ing] with the performance of a contract . . . between another and a third person by inducing . . . the third person not to perform the contract." *Restatement (Second) of Torts* § 766.

> "The fundamental difference between tort and contract," is this:
> "Tort actions are created to protect the interest in freedom from various kinds of harm. The duties of conduct which give rise to them are imposed by the law, and are based primarily upon social policy, and not necessarily upon the will or intention of the parties. . . . Contract actions are created to protect the interest in having promises performed. Contract obligations are imposed because of conduct of the parties manifesting consent, and are owed only to the specific individuals named in the contract." *Just's, Inc. v. Arrington Constr. Co.*, 99 Idaho 462, 583 P.2d 997, 1003 (1978), quoting W. Prosser, *Handbook of the Law of Torts*, § 92, p. 613 (4th ed. 1971).

More tersely stated, "[t]ort actions lie for breaches of duties imposed by law as a matter of social policy, while contract actions lie only for breaches of duties imposed by mutual consensual agreements between particular individuals." *Iron Mountain Security Stor-*

age Corp. v. American Specialty Foods, Inc., 457 F.Supp. 1158, 1165 (E.D. Pa. 1978).

The heart of the matter is that an action against a nonparty for interference with a party's performance of a contract does *not* seek the enforcement of contractual rights and obligations. Indeed, "it is essential to a claim of tortious interference with contractual relations that the plaintiff establish that the defendant is a third party, i.e., a stranger to the contract with which the defendant allegedly interfered." *Perry v. UNUM Life Ins. Co.*, 353 F.Supp.2d 1237, 1240 (N.D. Ga. 2005). And, a variation on the tort imposes liability on a stranger to the relationship who prevents the contract from even being formed. *Restatement (Second)* § 766B ("Intentional Interference with Prospective Contractual Relation").

Rather, "Intentional Interference with Performance of Contract by Third Persons" – like all torts – is concerned with enforcing social norms established by the courts and not with enforcing norms the parties to a contract have established by their agreement. The tort of intentional interference with contract is thus concerned not with every "interfer[ence] with the performance of a contract" but only "*improper*[] interfere[nce]" as "improper" is defined by the courts. *Restatement (Second)* § 766 (emphasis added). *See* Dobbs, *The Law of Torts* vol. 2, § 446, p. 1259 (2001) ("intentional and improper interference with the plaintiff's contract . . . with another"). The "factors [to be considered] in determining whether interference is improper" have nothing to do with the terms of the contract in question or whether the defendant has violated a contractual obligation to the plaintiff and instead turn on "whether the [defendant's] conduct was fair and reasonable under the circumstances." *Restatement (Second)* § 767 & comment j,

p. 37.

Among the factors to be considered in determining whether interference is "improper" are: "the nature of the actor's conduct," "the actor's motive," "the interests sought to be advanced by the actor," "the societal interests in protecting the freedom of action of the actor and the contractual interests of the other," and "the relations between the parties." *Restatement (Second)* § 767. Thus, in determining whether interference with a contract is wrongful:

> "The issue in each case is whether the interference is improper or not under the circumstances; whether, upon a consideration of the relative significance of the factors involved, the conduct should be permitted without liability, despite its effect of harm to another. The decision therefore depends upon a judgment and choice of values in each situation." *Id*. comment b, p. 28.

None of this broad-gauged judicial policy-making has anything to do with the courts' charge to "fashion a body of federal law for the enforcement of . . . collective bargaining agreements." *Lincoln Mills*, 353 U.S. at 451. To the contrary, this Court has repeatedly cautioned that "*Lincoln Mills* did not envision any freewheeling inquiry into what the federal courts might find to be the most desirable rule." *Howard Johnson Co. v. Hotel Employees*, 417 U.S. 249, 255 (1974). Rather, "the policy of free collective bargaining" that was of "particular importance" to "the 1947 Taft-Hartley Act Congress" that enacted § 301 requires "that the parties' agreement primarily determines their relationship" and makes it inappropriate for courts exercising § 301 jurisdiction to "substitute a different resolution" for that reached by the parties to the agreement. *Carbon Fuel Co. v. Mine Workers*, 444 U.S. 212, 218-19 (1979).

C. While we believe that the foregoing is dispositive, we would be derelict if we did not add – as the *Restatement (Second) of Torts*, Div. Nine, Introductory Note, vol. 4, p. 2, expressly recognized – that Congress' enactment of the National Labor Relations Act has served to transfer the authority for policing allegedly improper union or employer interference with labor contracts from the common law courts to the National Labor Relations Board. The enactment of the NLRA and the creation of the NLRB to administer that statute seals the case against reading LMRA § 301 as licensing the judicial creation of a body of federal tort law regarding interference with labor contracts.

Prior to the enactment of the National Labor Relations Act, the common law of torts had developed a comprehensive set of rules governing permissible and impermissible conduct in labor disputes. These rules were summarized in Chapter 38 ("Labor Disputes") of the *Restatement (First) of Torts* (1939).[7] Chapter 38's rules governing "Labor Disputes" were treated as a subset of the rules defining liability for "Inducing Breach of Contract or Refusal to Deal," and were described by the *Restatement (First)* as "applications to the concerted action by workers of the general principles underlying the rule[s] [regarding] . . . Concerted Refusal to Deal and . . . Inducing Refusal to Deal or Breach of Contract." *Restatement (First) of Torts*, vol. IV, pp. 48-49, 93-94. In other words,

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[7] Work began on the division of the *Restatement* on Interferences in Interests in Business Relations in the Fall of 1936 under the direction of Harry Shulman, an influential professor of labor law at the Yale Law School. *Restatement (First)*, vol. IV, Introduction, p. vii. *See, e.g., Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. at 578-80 (relying upon Professor Shulman's work).

Chapter 38 of the *Restatement (First) of Torts* articulated the *pre-NLRA* application of the interference with contract tort to the particular context of labor disputes.

The basic pre-NLRA common law tortious interference rule was summarized by the *Restatement (First) of Torts* as follows:

> "Workers are privileged intentionally to cause harm to another by concerted action if the object and the means of their concerted action are proper; they are subject to liability to the other for harm so caused if either the object or the means of their concerted action is improper." *Restatement (First)* § 775.

The First *Restatement of Torts* gave the following rationale for this basic rule:

> "Concerted action by workers merely in making requests of employers, without threat of pressure to secure concession, causes no harm and is not actionable; but concerted action to enforce the requests necessarily involves pressure on the employer which may cause him financial loss or at least interfere with his freedom to operate his business as he likes. Such concerted action, then, necessarily involves the infliction of intentional harm. This was regarded as subjecting the workers to liability unless their conduct was justified; and this theory has prevailed. The development of the law in succeeding years has related to the issue of justification." *Restatement (First)* Ch. 38, Introductory Note, pp. 94-95.

"[I]n the case of labor combinations," then, the pre-NLRA tortious interference law was premised on the notion "that mere concert may make illegal or at least require justification for conduct in which individuals are free to engage without the requirement of

justification when acting independently." *Restatement (First)* Ch. 38, Introductory Note, p. 95.

Accordingly, Chapter 38 of the *Restatement (First)* contained elaborate rules defining what was proper or improper with regard to "Objects of Concerted Action," *id.* §§ 784-796, and with regard to "Types of Concerted Action by Employees in Aid of Dispute[s] With [Their] Own Employer," *id.* §§ 797-801, or "in Aid of Dispute[s] With Another Employer," *id.* §§ 802-806.

In enacting the National Labor Relations Act, Congress rejected the notion that "[c]oncerted action by workers . . . in making requests of employers" that "involves pressure on the employer" should "subject[] the workers to liability unless their conduct was justified." *Restatement (First)*, pp. 94-95. To the contrary, the NLRA affirmatively guarantees employees the right "to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. And, "[t]he presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the [NLRA] recognized." *NLRB v. Insurance Agents*, 361 U.S. 477, 489 (1960).

Equally to the point here, the NLRA established the National Labor Relations Board as the agency charged with defining and enforcing the federal labor law. "Congress' later enactment of the NLRA" thus "took from the courts much of the power to regulate the relations between employers of labor and workingmen by granting authority to an administrative agency." *BE&K Construction Co. v.* NLRB, 536 U.S. 516, 543 (2002) (Breyer, J., concurring). It was henceforth "the Board's special function" to consider "carefully the interests of both sides of any labor-management controversy" and "balanc[e] the . . . con-

flicting legitimate interests" in a manner that "effectuate[s] national labor policy." *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963).

The reporters who drafted the post-NLRA *Restatement (Second) of Torts* found it "[o]bvious[]" that "the law of labor disputes and their effect in interfering with contractual relations has ceased to be regarded as a part of Tort Law and has become an integral part of the general subject of Labor Law, with all of its statutory and administrative regulations." *Restatement (Second)*, Div. Nine, Introductory Note, vol. 4, p. 2. "Chapter 38 . . . entitled Labor Disputes" was therefore "omitted from the Second Restatement of Torts." *Ibid.*

In other words, following the enactment of the National Labor Relations Act, the "rules of the game," *Restatement (Second)* § 767, comment j, p. 37, with respect to labor relations – and particularly "[t]he rules governing disputes that arise out of the collective-bargaining process" – "are within the special competence of the National Labor Relations Board." *Textron*, 523 U.S. at 662 (Stevens, J., concurring). Although "[t]here are situations in which district judges must occasionally resolve labor issues, . . . they surely represent the exception rather than the rule." *Laborers Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 552 (1988).

As the pre-NLRA development of tort law up to the appearance of the *Restatement (First) of Torts* demonstrates, the judicial development and application of an LMRA § 301 common law of tortious interference with contractual relations would deeply involve the courts in weighing conflicting labor relations interests to demarcate which economic weapons are proper and which are improper in the collective bargaining context. Congress plainly did not intend

LMRA § 301's grant of jurisdiction to enforce collective bargaining agreements to become the source of a full-blown judicially-created system of rules regulating labor disputes that would supplement the rules articulated and enforced by the NLRB.

D. In the end, Granite Rock's argument is a plea that "public policy mandates that Granite Rock have a remedy under Section 301(a)" for the IBT's alleged inducement of Local 287 to breach the no-strike clause in the Local's agreement with Granite Rock, because without such a § 301 claim against the IBT "Granite Rock would be without a remedy" for the Local's breach of contract. Pet. Br. 54 (capitalization omitted). Leaving aside the obvious rejoinder that Granite Rock clearly has a remedy against Local 287 for any breach of the no-strike clause committed by that party to the collective bargaining agreement, it is simply not true that without the resurrection of the law of tortious interference with labor contracts employers will be left without a remedy for wrongful international union conduct of the kind that Granite Rock alleges here.

In the first place, the contract law rules that do apply under § 301 provide ample means for employers to protect themselves from such wrongful international union conduct.

Just as separate corporations can be treated as "alter egos" in order to apply a collective bargaining agreement to a nonsignatory employer, *see, e.g., Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 504-507 (5th Cir. 1982), it is possible to "pierce the shield that Congress took such care to construct" in § 301(e)'s "clear statement of the limits of an international union's legal responsibility for the acts of one of its local unions," *Carbon Fuel*, 444 U.S. at 217-18. But to pierce the shield between

an international union and its local affiliate, just as to pierce the shield between a parent corporation and its subsidiary, it is necessary to show *both* "a unity of interest and ownership [or control] . . . such that their separate personalities no longer exist" *and* that "an inequitable result will follow" if the shield is not pierced. *Tamko Roofing Products v. Smith Engineering Co.*, 450 F.3d 822, 827 (8th Cir. 2006). Granite Rock has not alleged that either of these preconditions exists here.

Beyond that, Granite Rock could have bargained to make the IBT a party to the agreement, *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 350 (1958), or to make the IBT's resources available to cover damages resulting from breach of the no-strike clause, *North Carolina Furniture, Inc.*, 121 NLRB 41, 41-42 (1958). Such demands are recognized as lawful, permissive (but not mandatory) subjects of bargaining. *See North Carolina Furniture*, 121 NLRB at 42. Granite Rock did not bargain to include either provision in the Company's agreement with Local 287, and so long as "neither the collective-bargaining process nor its end product violates any command of Congress, a federal court has no authority to modify the substantive terms of a collective-bargaining contract." *UMWA Health & Retirement Funds v. Robinson*, 455 U.S. 562, 576 (1982).

Aside from the contract law remedies available under LMRA § 301, the unfair labor practice provisions of the National Labor Relations Act provide employers with additional protections against wrongful international union interference with the collective bargaining relationships between employers and local union affiliates of the international.

The alternative unfair labor practice theory advanced by the NLRB General Counsel in the unfair

labor practice case against Local 287 was that the Local "violated Section 8(b)(3) by conditioning the holding of the ratification vote on the Employer's willingness to reach agreement on nonmandatory subjects of bargaining," i.e., a "back-to-work agreement [that] covered other unions and other bargaining units." *Teamsters Local 287*, 347 NLRB at 345.[8] The NLRB General Counsel's alternative unfair labor practice theory thus alleges essentially the same sort of wrongdoing as Granite Rock's LMRA § 301 interference with contract claim against the IBT, i.e., interfering with the formation of a Granite Rock/Local 287 collective bargaining agreement "in order to put pressure on [Granite Rock] to agree to a Back to Work Agreement that included hold-harmless provisions that would protect Defendant IBT, Local 287 and the Teamsters Locals, all of which are affiliated with the IBT, from liability for their actions related to the unlawful strike." JA 318 ¶ 45.

The overlap between Granite Rock's § 301 claim against the IBT and the NLRB General Counsel's unfair labor practice complaint against Local 287 brings

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[8] The NLRB has a complicated set of rules for determining when it is appropriate to interject issues concerning other bargaining units into negotiations. For example, it is an unfair labor practice for an international union to condition approval of a collective bargaining agreement between an employer and one of the international's local affiliates on the employer reaching agreement with another local affiliate. *Standard Oil Co. v. NLRB*, 322 F.2d 40, 45 (6th Cir. 1963). But it is not an unfair labor practice for the locals to all demand common expiration dates for their various agreements with the employer. *United States Pipe and Foundry Co. v. NLRB*, 298 F.2d 873, 877-78 (5th Cir. 1962). And the locals may demand that the employer bargain each agreement with a committee composed of representatives from all of the locals. *General Electric Co.*, 173 NLRB 253, 256 (1968), *enf'd*, 412 F.2d 512 (2d Cir. 1969).

into play the NLRA rule that an international union commits an unfair labor practice by causing its affiliated local unions to "impose extraneous non-bargaining unit considerations into the collective-bargaining process." *Paperworkers Local 620 (International Paper Co.)*, 309 NLRB 44, 44 (1992). *See also Kobell v. United Paperworkers International Union*, 965 F.2d 1401, 1407 (6th Cir. 1992). Given that rule, the alleged wrongful conduct that is the subject of the Third Amended Complaint's "interference/inducement of breach of contract" claim against the IBT would arguably constitute an unfair labor practice for essentially the same reasons advanced by the NLRB General Counsel in his unfair labor practice complaint against Local 287. Once again, Granite Rock did not allege that the IBT had committed an unfair labor practice in the charges filed by the Company.

In sum, the problem for Granite Rock is not the lack of available federal remedies for wrongful international interference in the collective bargaining relationship between an employer and the international's local-union affiliate but that Granite Rock lacks any evidentiary basis for invoking those remedies in the circumstances presented by this case.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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