**[Cite as *Internatl. Union of Operating Engineers, Local 18 v. Norris Bros. Co., Inc.*, 2015-Ohio-1140.]**

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
**No. 101353**

**INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 18**

PLAINTIFF-APPELLEE

vs.

**NORRIS BROTHERS CO., INC.**

DEFENDANT-APPELLANT

**JUDGMENT:**
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-13-813179

**BEFORE:** Kilbane, P.J., Stewart, J., and Boyle, J.

**RELEASED AND JOURNALIZED:** March 26, 2015

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MARY EILEEN KILBANE, P.J.:

**{¶1}** Defendant-appellant, Norris Brothers Co., Inc. ("Norris"), appeals from the trial court's judgment granting plaintiff-appellee's, International Union of Operating Engineers, Local 18 ("Local 18") petition to enforce arbitration and denying Norris's motion to dismiss. For the reasons set forth below, we affirm.

**{¶2}** The instant appeal arises from a labor dispute between Local 18 (a labor organization representing operating engineers) and Norris (the employer) over the assignment of forklift work at a Norris job site. Norris is a member of the Construction Employers Association and entered into a Construction Employers Building Agreement (commonly referred to as a collective bargaining agreement or "CBA") with Local 18. This agreement provides that Norris shall employ operating engineers to erect, operate, assemble, disassemble, maintain, and repair forklifts. The agreement also establishes a binding grievance and arbitration procedure for disputes arising out of the CBA between the parties.

**{¶3}** In July 2012, Local 18 submitted a written grievance to Norris regarding Norris's breach of the CBA by failing to employ an operating engineer on its forklift on July 18, 2012. Norris and Local 18 could not resolve the grievance. Thereafter, on September 24, 2012, Local 18 requested that the matter be submitted to arbitration in accordance with the CBA. Norris, however, refused to arbitrate the grievance because it wished to await a decision in a 2008 National Labor Relations Board ("NLRB") proceeding filed by different employers (not including Norris).

**{¶4}** Subsequently, on September 3, 2013, Local 18 filed a petition to enforce arbitration under R.C. 2711.03 in the Cuyahoga County Court of Common Pleas. In its petition, Local 18 alleged that Norris refused to submit its grievance to arbitration, despite Local 18 having fulfilled all of the requirements under the CBA. In response, Norris filed a motion to dismiss for lack of

subject matter jurisdiction, arguing that Local 18's petition was preempted by the National Labor Relations Act ("NLRA"). Norris referred to the previous proceeding pending before the NLRB, in which several employers sought relief under NLRA Section 10(k) in response to efforts by Local 18 to obtain forklift work from other trades, including teamsters, laborers, carpenters, and ironworkers. Local 18 opposed Norris's motion to dismiss, contending that Norris failed to satisfy its substantial burden in demonstrating that the circumstances warranted preemption. Local 18 then filed a motion to strike Norris's motion to dismiss on September 25, 2013.

**{¶5}** On January 24, 2014, the matter was scheduled for a hearing on Local 18's petition to enforce arbitration and Norris's motion to dismiss. On that day, the trial court continued the matter to March 14, 2014, and denied Local 18's motion to strike. The March 14th hearing was subsequently continued to March 26, 2014.

**{¶6}** At the March 26, 2014 hearing, Norris admitted that it was a party to the CBA, which contains an arbitration clause. Norris discussed the arbitration agreement, noting that "the arbitrator has no power to add to, subtract from, or modify any of the terms and provisions of this agreement." Norris stated that this is critical to the matter because it has a second CBA with the International Brotherhood of Teamsters and Local No. 407 ("Teamsters"), which also has a jurisdiction provision that identifies forklifts. Norris argued that Local 18's grievance, coupled with the March 14, 2014 proceeding before the NLRB involving Norris and the Teamsters, gives exclusive jurisdiction to the NLRB. Norris explained that the NLRB accepted jurisdiction of the recent charge it had filed, alleging that the Teamsters had committed an unfair labor practice in violation of Section 8 of the NLRA. Specifically, the Teamsters sent a letter to Norris on March 13, 2014, which stated that the Teamsters would "engag[e] in picketing and strike activities against [Norris]" if forklift work was assigned to Local 18. Norris did not allege

any violations against Local 18 in its March 2014 charge, and at the hearing before the trial court, Norris stated that it was not alleging that Local 18 was engaged in conduct prohibited by the NLRA.

**{¶7}** Local 18 argued that the CBA's grievance and arbitration provision governed the matter, and asked the trial court to ensure "that [Norris] lives up to its obligation to arbitrate disputes arising out of the [CBA]." The trial court asked, "[w]hat would be the issue for the arbitrator?" Local 18 replied,

> The arbitrator would simply be looking to determine, one, whether or not the contract requires that the equipment at issue be assigned to Local 18; two, whether or not that was breached, i.e., whether or not [Norris] elected to assign that equipment to somebody other than an operating engineer; and three, if there is a breach, what shall the penalty be.

**{¶8}** On April 11, 2014, the trial court issued its order and an opinion granting Local 18's petition to enforce arbitration and denying Norris's motion to dismiss. In its well-reasoned opinion, the court determined that Local 18's petition was not preempted by federal law. The court found that

> the issue before the court involves a simple collective-bargaining agreement grievance related to a forklift assignment. The question of whether unfair labor practices have been committed by the Teamsters, a party-in-interest [to the NLRB proceeding] and not a party to this particular collective-bargaining agreement, may still be determined by the NLRB. The arbitration petition before the court is not preempted under [*San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959)] as separate collective-bargaining agreement grievance proceedings are allowable under § 301 of the Taft-Hartley Act as well as current U.S. Supreme Court interpretation of the National Labor Relations Act. *See, e.g.*, [*William E. Arnold Co. v. Carpenters Dist. Council of Jacksonville*, 417 U.S. 12, 94 S.Ct. 2069, 40 L.Ed.2d 620 (1974)].

**{¶9}** It is from this order that Norris appeals, raising the following two assignments of error for review.

Assignment of Error One

> The common pleas court erred in denying [Norris's] motion to dismiss [Local 18's] petition to enforce arbitration agreement because the trial court lacked subject matter jurisdiction over [Local 18's] petition.

Assignment of Error Two

> The common pleas court erred in granting [Local 18's] petition to enforce arbitration agreement.

Motion to Dismiss

**{¶10}** In the first assignment of error, Norris contends that the trial court erred by denying its motion to dismiss for lack of subject matter jurisdiction under Civ.R. 12(B)(1).[1]

**{¶11}** We review a trial court's decision on a Civ.R. 12(B)(1) motion to dismiss under a de novo standard of review. *Bank of Am. v. Macho*, 8th Dist. Cuyahoga No. 96124, 2011-Ohio-5495, ¶ 7, citing *Crestmont Cleveland Partnership v. Ohio Dept. of Health*, 139 Ohio App.3d 928, 936, 746 N.E.2d 222 (10th Dist.2000). In order to dismiss a complaint under Civ.R. 12(B)(1), the court must determine whether a plaintiff has alleged any cause of action that the court has authority to decide. *Crestmont* at 936. When determining its subject matter jurisdiction pursuant to a Civ.R. 12(B)(1) motion to dismiss, the trial court is not confined to the allegations of the complaint and may consider material pertinent to such inquiry. *Southgate Dev. Corp. v. Columbia Gas Transm. Corp.*, 48 Ohio St.2d 211, 358 N.E.2d 526 (1976), paragraph one of the syllabus.

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[1]We recognize that generally, the denial of a motion to dismiss is not a final appealable order. However, there is a final appealable order in the instant case because the issue of subject matter jurisdiction is intertwined with the trial court's simultaneous grant of Local 18's petition to enforce arbitration. The trial court's grant of a petition to enforce arbitration under R.C. 2711.03 is a final appealable order because it prevented any further judgment and affected Norris's substantial rights. *Palumbo v. Select Mgmt. Holdings, Inc.*, 8th Dist. Cuyahoga No. 82900, 2003-Ohio-6045, ¶ 14; *Russell v. RAC Natl. Prod. Serv., LLC*, 4th Dist. Washington No. 14CA17, 2014-Ohio-3392, ¶ 13-15.

**{¶12}** In support of its assignment of error, Norris claims that Local 18's arbitration petition is preempted by federal law because the grievance underlying the petition (the demand for payment of damages in lieu of the assignment of forklift work) was subject to Section 8 of the NLRA.

**{¶13}** At the hearing before the trial court, Norris stated that Local 18 did not violate Section 8 of the NLRA. Norris argued the trial court lacked subject matter jurisdiction over Local 18's petition because of the pending March 2014 NLRB proceeding with the Teamsters, in which the Teamsters stated it would strike if Norris allowed Local 18's operators to perform forklift work. Norris claimed that Local 18's grievance, coupled with the March 14, 2014 proceeding gives exclusive jurisdiction to the NLRB. The trial court, however, found that Local 18's petition is not preempted by federal law. We agree.

**{¶14}** Section 8(b)(4)(D) of the NLRA provides that it is an unfair labor practice for a union to induce or encourage the employees of any employer to engage in a strike or to perform any services, where the object is requiring any employer to assign particular work to employees in a particular labor organization rather than to employees in another labor organization. Generally, state court jurisdiction is preempted when an activity is arguably prohibited by Section 8 of the NLRA. *Carpenters*, 417 U.S. 12, 16, 94 S.Ct. 2069, 40 L.Ed.2d 620, citing *Garmon*, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775. In *Garmon*, the United States Supreme Court set forth the original standard for determining whether federal jurisdiction preempted that of the state. The Court stated that: "[w]hen an activity is arguably subject to § 7 or § 8 of the [National Labor Relations] Act, 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." *Id.* at 245.

**{¶15}** The preemption inquiry is whether the conduct at issue was arguably protected or prohibited by the NLRA. *Internatl. Longshoremen's Assn., AFL-CIO v. Davis*, 476 U.S. 380, 394-395, 106 S.Ct.1904, 90 L.Ed.2d 389 (1986). The *Davi*s Court stated:

> The precondition for pre-emption, that the conduct be "arguably" protected or prohibited, is not without substance. It is not satisfied by a conclusory assertion of pre-emption[.] If the word "arguably" is to mean anything, it must mean that the party claiming pre-emption is required to demonstrate that his case is one that the Board could legally decide in his favor. That is, a party asserting pre-emption must advance an interpretation of the Act that is not plainly contrary to its language and that has not been "authoritatively rejected" by the courts or the Board. * * * The party must then put forth enough evidence to enable the court to find that the Board reasonably could uphold a claim based on such an interpretation.

*Id.* at 394-395.

**{¶16}** The party "asserting pre-emption 'must make an affirmative showing that the activity is arguably subject to the [National Labor Relations] Act.'" *Makro, Inc. v. United Food & Commercial Workers Union, Local 880*, 64 Ohio App.3d 439, 444, 581 N.E.2d 1143 (11th Dist.1989), quoting *Davis* at 399; *Kulak v. Mail-Well Envelope Co.*, 8th Dist. Cuyahoga No. 76974, 2000 Ohio App. LEXIS 3949 (Aug. 31, 2000).

**{¶17}** We note, however, that when the activity in question also constitutes a breach of a collective bargaining agreement, the NLRB's authority "'is not exclusive and does not destroy the jurisdiction of the courts in suits under § 301 [of the Taft-Hartley Act, also known as the Labor Management Act].'" *Carpenters* at 16, quoting *Smith v. Evening News Assn.*, 371 U.S. 195, 197, 83 S.Ct. 267, 9 L.Ed.2d 246 (1962). This exception was fashioned because the history of § 301 reveals that "Congress deliberately chose to leave the enforcement of collective agreements 'to the usual processes of the law.'" *Dowd Box Co. v. Courtney*, 368 U.S. 502, 513, 82 S.Ct. 519, 7 L.Ed. 2d 483 (1962). "Indeed, [the NLRB's] policy is to refrain from exercising

jurisdiction in respect of disputed conduct arguably both an unfair labor practice and a contract violation when, as in this case, the parties have voluntarily established by contract a binding settlement procedure." *Carpenters* at 16, citing *Collyer Insulated Wire*, 192 N.L.R.B. 837, 77 L.R.R.M. 1931 (1971). The NLRB said in *Collyer*:

> an industrial relations dispute may involve conduct which, at least arguably, may contravene both the collective agreement and our statute. When the parties have contractually committed themselves to mutually agreeable procedures for resolving their disputes during the period of the contract, we are of the view that those procedures should be afforded full opportunity to function * * *. We believe it to be consistent with the fundamental objectives of Federal law to require the parties * * * to honor their contractual obligations rather than, by casting [their] dispute in statutory terms, to ignore their agreed-upon procedures.

*Id.* at 842-843.

**{¶18}** In the instant case, the issue before the trial court involves a CBA grievance and subsequent remedy for the violation of the assignment of forklift operation. Norris's alleged violation of a contract clause and Local 18's attempt to seek monetary damages is not "arguably violative" of Section 8 of the NLRA because Local 18 is not attempting to enforce the assignment of work, nor is it threatening to strike. The record demonstrates that the NLRB charge against the Teamsters (a nonparty to the instant case) involves a threat made by the Teamsters — not Local 18 — to strike over conduct that occurred in 2014, nearly two years after the alleged CBA violation in 2012. The subsequent conduct of the Teamsters in a different matter is not imputed to Local 18's current petition to enforce arbitration. As a result, Norris failed to demonstrate that *Garmon* preemption is warranted. *Makro* at 444-445. Therefore, the court had jurisdiction over the subject matter and properly denied Norris's motion to dismiss.

**{¶19}** Accordingly, the first assignment of error is overruled.

Petition to Enforce Arbitration

**{¶20}** In the second assignment of error, Norris argues that the trial court erred by granting Local 18's petition to enforce arbitration because: (1) the trial court lacked subject matter jurisdiction; (2) the trial court failed to conduct a trial on the validity of the agreement; (3) and the trial court did not allow Norris the opportunity to file a responsive pleading.

**{¶21}** The appropriate standard of review for an order compelling arbitration depends on "the type of questions raised challenging the applicability of the arbitration provision." *McCaskey v. Sanford-Brown College*, 8th Dist. Cuyahoga No. 97261, 2012-Ohio-1543, ¶ 7. Generally, an abuse of discretion standard applies in limited circumstances, such as a determination that a party has waived its right to arbitrate a given dispute. *Id.*, citing *Milling Away, L.L.C. v. UGP Properties, L.L.C.*, 8th Dist. Cuyahoga No. 95751, 2011-Ohio-1103, ¶ 8. We note that the abuse of discretion standard of review has no application in the context of the court deciding to stay proceedings pending the outcome of arbitration because a stay in such circumstances is mandatory, not discretionary. *N. Park Retirement Community Ctr., Inc. v. Sovran Cos., Ltd.*, 8th Dist. Cuyahoga No. 96376, 2011-Ohio-5179, ¶ 7 (Under R.C. 2711.02 and 2711.03, once the trial court determined that the parties had agreed to arbitrate a dispute and it ordered the parties to proceed to arbitration, staying the action pending the outcome of arbitration was required, such that review thereof was de novo rather than an abuse of discretion because there was no discretion in the decision to stay the matter.) In this case, we apply a de novo standard of review because we are reviewing the trial court's decision to grant Local 18's petition to enforce arbitration.

**{¶22}** Norris first argues the trial court lacked subject matter jurisdiction, and therefore, should not have granted Local 18's petition to enforce arbitration. However, having found that

the trial court has subject matter jurisdiction over the dispute, we find this argument unpersuasive.

**{¶23}** Norris next argues the trial court erred by failing to conduct a trial on the validity of the agreement.

**{¶24}** In the instant case, Local 18 filed its petition to enforce arbitration under R.C. 2711.03, which provides in pertinent part:

> (A) The party aggrieved by the alleged failure of another to perform under a written agreement for arbitration may petition any court of common pleas having jurisdiction of the party so failing to perform for an order directing that the arbitration proceed in the manner provided for in the written agreement. * * * The court shall hear the parties, and, upon being satisfied that the making of the agreement for arbitration or the failure to comply with the agreement is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the agreement.
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> (B) If the making of the arbitration agreement or the failure to perform it is in issue in a petition filed under division (A) of this section, the court shall proceed summarily to the trial of that issue. If no jury trial is demanded as provided in this division, the court shall hear and determine that issue. Except as provided in division (C) of this section, if the issue of the making of the arbitration agreement or the failure to perform it is raised, either party, on or before the return day of the notice of the petition, may demand a jury trial of that issue.
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> * * *
>
> (C) If a written agreement for arbitration is included in a commercial construction contract and the making of the arbitration agreement or the failure to perform it is in issue in a petition filed under division (A) of this section, the court shall proceed summarily to the trial of that issue, and the court shall hear and determine that issue.

**{¶25}** Norris contends the trial court erred in granting Local 18's petition because the court failed to inquire into the validity of the agreement and whether Norris's alleged failure to comply was at issue. We recognize that the trial court is only required to evaluate the validity of the arbitration provision where the party opposing it has actually raised a challenge to the validity

of the provision. *Miller v. Household Realty Corp.*, 8th Dist. Cuyahoga No. 81968, 2003-Ohio-3359, ¶ 28, citing *Williams v. Aetna Fin. Co.*, 65 Ohio St.3d 1203, 1204, 602 N.E.2d 246 (1992), *aff'd,* 83 Ohio St.3d 464, 1998-Ohio-294, 700 N.E.2d 859. If the trial court determines that the validity of, or compliance with the arbitration provision is not in issue after hearing the parties, the trial court is then required to compel arbitration. *Dunn v. L&M Bldg., Inc.*, 8th Dist. Cuyahoga No. 75203, 1999 Ohio App. LEXIS 1166, *6-7 (Mar. 25, 1999).

**{¶26}** Here, Norris never requested a trial, nor challenged the validity, scope, or compliance of the arbitration clause before the trial court. At the March 26, 2014 oral argument before the trial court, Norris had the opportunity to be heard. It argued the court lacked subject matter jurisdiction because the matter was preempted by federal law. The arbitration clause at issue was discussed by both parties and the trial court, yet Norris never challenged the validity of the agreement.

**{¶27}** By arguing preemption only and not challenging the validity of the agreement, Norris in effect conceded the elements of R.C. 2711.03(A) and (B) — there was a valid agreement between the parties and that it refused to arbitrate the dispute. As a result, the making of the arbitration agreement and the failure to comply with the agreement are not at issue, and a trial is not required under R.C. 2711.03. Therefore, this argument is likewise unpersuasive.

**{¶28}** Last, Norris argues the trial court erred by not giving Norris the opportunity to file a responsive pleading after it denied its motion to dismiss.

**{¶29}** Generally, Civ.R. 12(A) allows for the filing of a responsive pleading after the trial court's denial of a motion to dismiss. However, the circumstances of the instant case did not necessitate a responsive pleading. Here, the trial court held a hearing, at which both parties had

the opportunity to discuss the arbitration clause. Norris did not object to the arbitration clause nor challenge its validity. The trial court issued an order granting Local 18's petition to enforce arbitration and denying Norris's motion to dismiss. By simultaneously granting Local 18's petition and denying Norris's motion, the trial court found that the petition is not preempted by federal law and the matter is subject to arbitration. As a result, a responsive pleading was not warranted.

**{¶30}** Accordingly, the second assignment of error is overruled.

**{¶31}** Judgment is affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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MARY EILEEN KILBANE, PRESIDING JUDGE

MELODY J. STEWART, J., and
MARY J. BOYLE, J., CONCUR