

{¶2} On October 25, 2007, plaintiff filed a post trial brief. Also on October 25, 2007, defendant filed a posttrial brief. In addition, defendant filed proposed findings of fact and conclusions of law. The briefs have been reviewed. The matter is now ready for decision. For the reasons set forth herein, judgment is granted to defendant and against plaintiff.

{¶3} Defendant, Dayton Newspapers, Inc., agreed to dismiss its counterclaim or counterclaims pursuant to Civ.R. 41(A). This matter went forth on the claims of the union and six members.

FINDINGS OF FACT

{¶4} Plaintiff, General Truck Drivers, Chauffeurs, Warehousemen and Helpers, Local Union No. 957, affiliated with the International Brotherhood of Teamsters (hereinafter “Union” or “Local 957”), is the duly certified collective-bargaining representative of a unit of truck drivers, warehouse employees, and garage employees employed by defendant, Dayton Newspapers, Inc. (hereinafter “DNI”).

{¶5} The Union and DNI were parties to a series of successive collectively bargained agreements, including but not limited to agreements entered into on November 17, 1982, and on January 28, 1996. The January 28, 1996 collective-bargaining agreement was to continue in full force and effect until November 15, 1998.

{¶6} Among other terms and conditions, the January 28, 1996 collective-bargaining agreement contains a guaranteed-jobs provision, which states:

All full-time employees employed by the company on September 24, 1982 (whose names are listed on Exhibit A attached hereto) shall be employed as a full-time employee within the bargaining unit for their lifetimes and shall not be laid off for any reason, except that layoff shall be permitted whenever, and only for as long as, publication is discontinued. The foregoing protection against layoff extends for the lifetimes of such employees or until they quit, retire, or are discharged (and the discharge upheld in the procedures set forth in Articles 11, 12 and 13 of this Agreement). Nothing contained in this paragraph shall be

construed in any way to limit the right of the Company to lay off any other employee under the terms of this Agreement.

{¶7} This provision was originally included in the contract that took effect in 1982. This provision was agreed to by DNI in exchange for certain concessions by bargaining-unit employees.

{¶8} Although not denoted as "Exhibit A" as referenced in Article 28 of the January 28, 1996 collective-bargaining agreement, the parties acknowledge and do not dispute that a page of that agreement entitled "DNI Driver," with a list of names that includes, but is not limited to, Brian Acton, Edgar Davenport, Dale Dorsten, Martin Pulley, Peter Thomson, and Edward Wilke, is the document intended to be the "Exhibit A" referred to in Article 28 of the agreement.

{¶9} As indicated above, the guaranteed-jobs provision was first negotiated in the 1982-1985 contract between the parties, and the substantive language of this provision did not change through the 1996-1998 contract.

{¶10} Plaintiffs' claim alleges that DNI breached Article 28 of the January 28, 1996 collective-bargaining agreement; however, the parties have stipulated that any alleged damages are limited to the period June 27, 1999, through December 27, 1999.

{¶11} Collective-bargaining agreements between the Union and DNI are the only source of the union's claim in this lawsuit, either on behalf of itself or on behalf of Brian Acton, Edgar Davenport, Dale Dorsten, Martin Pulley, Peter Thomson, and Edward Wilke; no individual employment contract existed between any of these natural persons and DNI.

{¶12} Among other terms and conditions, the January 28, 1996 collective-bargaining agreement contains a "no strikes provision," which states:

No employee covered by this Agreement shall engage in any walk-out, slowdown, strike or boycott, or sympathy strike. Nor shall they hamper or interfere with prompt and regular publication, or aid or encourage, directly or indirectly, such practices against the Company, nor shall the Union sanction any such practices against the Company, and the Company agrees that there shall be no lock out during the life of this Contract.

{¶13} The January 28, 1996 collective-bargaining agreement also contains a “grievance procedure,” which states:

Section 1: Any differences, disputes or complaints arising over the interpretation or application of the contents of the Agreement may be a grievance if submitted in written form. No grievance shall be considered unless it is submitted in written form. No grievance shall be submitted unless it is submitted in writing within seven (7) days of its occurrence. The Company may present a grievance involving the interpretation or application of this Agreement by submitting it in writing in Step 2 of this procedure. There shall be an earnest effort on the part of both parties to settle grievances properly through the following steps;

Step 1.

By conference between the aggrieved employee, his steward if he so requests, and the immediate supervisor.

Step 2.

By conference between the business representative of the Union and the appropriate steward and other such persons as the aggrieved employee requests with an official or officials of the Company.

Step 3.

Failing adjustment of the grievance in Step 2, either the union or the Company may submit the grievance to Arbitration by notifying the other party within thirty (30) calendar days of the submission of the grievance to the Company. Failure to so notify the other party within the thirty (30) day period shall nullify the grievance. The time limits set forth above may be extended by mutual agreement.

{¶14} The January 28, 1996 collective-bargaining agreement contains a provision entitled “Arbitration,” which states:

Section 1.

If Arbitration is requested in accordance with requirements as stated in Article 12, the parties shall attempt to reach an agreement upon the name of the arbitrator. If

the parties are unable to agree upon an arbitrator within five (5) working days from the date of the request or agreement to arbitrate, either party may request the Federal Mediation and Conciliation Service to submit a list of five (5) arbitrators' names from which to select an arbitrator. When the list is received, either party may reject the list and request that the Federal Mediation and Conciliation Service supply a second list of five (5) new names. The representative of the party requesting arbitration shall strike one name from the list. This process shall then be repeated with the parties alternating strikes in sequence until only one name remains. The party whose name remains on the list shall be the arbitrator.

Section 2.

The Arbitrator will have jurisdiction over only the alleged violation of the express, explicit terms of this written labor agreement. The arbitrator shall have no power to change, modify, add to, or detract from any terms of the contract. The past practice of the parties may be used by the arbitrator only to interpret an ambiguous term of this Agreement; it may not be used, however, to overrule an express term of this Agreement, or create rights, conditions, limits or obligations not expressly recognized herein. In discharge cases, the arbitrator shall have the power, but is not required, to order the discharged employee reinstated with back pay, less amounts received elsewhere if he shall determine that the company did not discharge such an employee for proper cause. The expense of the arbitrator shall be paid jointly by the union and the company and the decision of the arbitrator shall be final and binding.

Section 3.

Both parties hereto recognize the desirability of settling all grievances as expeditiously as possible and each agree to cooperate to expedite all settlements. The time limits set forth above may be extended by mutual agreement.

{¶15} Prior to and after the January 28, 1996 contract's expiration, and continuing to the present, the Union and DNI have been engaged in collective-bargaining negotiations to negotiate a successor agreement to the January 28, 1996 collective-bargaining agreement, but those negotiations have not produced a successor agreement.

{¶16} On June 26, 1999, some of the employees of the truck-driver bargaining unit represented by Local 957, including some of those senior employees who were covered by the guaranteed job provision, engaged in a one-day strike. The strike disrupted DNI's distribution of

the Sunday, June 27, 1999 newspaper, but did not preclude the paper from being published on that date or any other.

{¶17} On June 27, 1999, at approximately 8:47 a.m., John Burns, on behalf of the Union, sent a letter to a representative of DNI, stating that the Union “is advising its members employed as drivers * * * to return to work effective [Sunday] June 27, 1999 beginning at 10:00 p.m. Local 957 is making an offer to return to work on behalf of all its members employed by [DNI],”

{¶18} In response to the June 26, 1999 strike, DNI engaged in a lock-out of certain union employees, and by letter dated July 1, 1999, placed them on unpaid leave, commencing on and after June 27, 1999. Members of the union who did not cross the picket line and/or who did not affirmatively represent to DNI that they would reliably appear for work without engaging in future unannounced strikes were prohibited by DNI from reporting to work. DNI sent a letter dated July 1, 1999 to various truck drivers indicating that DNI had obtained an alternate source for delivery of its newspapers until it receives an acceptable commitment from Local 957 to make deliveries without disruption. DNI further indicated that work will not be available unless they can be relied on. The drivers were placed on unpaid leave effective June 27, 1999.

{¶19} DNI has not discontinued publication of the Dayton Daily News at any time since June 27, 1999, and continued to deliver its papers from the printing facility to its carriers and other distribution points, but without using drivers who held guaranteed job positions.

{¶20} DNI commenced a process of meeting drivers individually. DNI requested these drivers to give it a promise that they would appear for work and not engage in unannounced work stoppages such as occurred on June 26, 1999, as a condition to be reinstated. Some drivers agreed that they would reliably appear for work and not engage in unannounced work stoppages.

Other drivers indicated they could not provide assurance that they would not honor work stoppages by the union and/or fellow drivers. The drivers who promised to not engage in work stoppages were permitted to work, and the others were not. Brian Acton, Edgar Davenport, Dale Dorsten, Martin Pulley, Peter Thomson, and Edward Wilke either refused to meet with DNI's Mike Joseph or did not agree to not engage in a strike.

{¶21} The July 1, 1999 letter sent by DNI to the 13 driver members of the union who were laid off was sent to these individuals due to operational changes by DNI associated with its movement of some of its operations to a new building with a loading dock to accommodate larger trucks, and accordingly, DNI was able to use fewer trucks and fewer drivers to deliver its product. None of the 13 driver members of the union who were laid off by DNI on July 1, 1999, were covered by the guaranteed-jobs provision of the January 28, 1996 collective-bargaining agreement, and there is no claim being made by the union in this case on its or their behalf. The jobs of the 13 drivers of the union who were laid off were abolished. In contrast, the jobs of the 18 driver members of the union (including those of Brian Acton, Edgar Davenport, Dale Dorsten, Martin Pulley, Peter Thomson, and Edward Wilke) were not abolished.

{¶22} The July 1, 1999 letter sent by DNI to the 18 driver members of the union who were not laid off, but who were placed on unpaid leave, was sent both to persons who were covered by the guaranteed-jobs provision of the January 28, 1996 collective-bargaining agreement and those who were not. Brian Acton, Edgar Davenport, Dale Dorsten, Martin Pulley, Peter Thomson, and Edward Wilke are among the union driver members who are covered by the guaranteed-jobs provision of the January 28, 1996 collective-bargaining agreement who were not laid off, but who were placed on unpaid leave by DNI effective July 1, 1999; and they are the only individuals on whose behalf the union has asserted a claim in this

case. There was no break in seniority for Brian Acton, Edgar Davenport, Dale Dorsten, Martin Pulley, Peter Thomson, or Edward Wilke for the period June 27, 1999, to December 27, 1999.

{¶23} At no time between June 27, 1999, and December 27, 1999, were Brian Acton, Edgar Davenport, Dale Dorsten, Martin Pulley, Peter Thomson, or Edward Wilke ever advised by DNI that they were fired or discharged, nor were they paid severance by DNI. Between June 27, 1991, and December 27, 1999, DNI continued to pay the employer's portion of the health-care premiums on behalf of the locked-out workers. During that time, DNI did not pay any wages to Brian Acton, Edgar Davenport, Dale Dorsten, Martin Pulley, Peter Thomson, and Edward Wilke.

{¶24} The guaranty of a lifetime job set forth in the guaranteed jobs provision of the January 28, 1996 collective-bargaining agreement is a right or benefit that accrued to and/or vested in the persons covered by that provision at the time the collective-bargaining agreement was executed. Resolution of this lawsuit requires the interpretation of the collective-bargaining agreements containing the guaranteed-jobs provision.

{¶25} The union filed unfair labor charges against DNI with the National Labor Relations Board ("NLRB") at some time between June 27, 1999, and December 27, 1999, wherein the union alleged, among other things, that DNI's lock-out and/or placement of employees on unpaid leave and activities related thereto constituted bad-faith collective-bargaining in violation of Section 8 (a) (5) of the National Labor Relations Act (the "Act" or "NLRA"), Section 158(a)(5), Title 29, U.S.Code, as well as interference with the collective-bargaining rights of employees in violation of Section 7 of the NLRA, Section 157, Title 29, U.S.Code.

{¶26} On December 27, 1999, the acting regional director of the NLRB investigated the union's unfair-labor-practice charges against DNI, and, in case No. 9-CA-36894, concluded:

With respect to the allegation that the employer unilaterally changed the working conditions of employees who held guaranteed jobs for life, the investigation established that these employees were placed on unpaid leave at the time of the lock-out. Employees who agreed to give the employer assurances that they would not strike during the transition to the new facility were allowed to return to work. The evidence failed to establish that the employer, by legitimately placing such restrictions on the employees holding guaranteed jobs, violated Section 8 (a) (5) of the Act. In this regard, the evidence show that all guaranteed job employees have maintained their employee status and may return to work upon giving the employer reasonable assurance that they will not engage in future "quickie" strikes.

{¶27} Following the December 27, 1999 dismissal of the union's unfair-labor-practice charge, which alleged that DNI had unlawfully locked out or unlawfully conditioned striking employees' return to work on their assurance that they would not engage in additional strikes prior to the transition to the new facility in violation of Section 8(a)(3) of the Act, and following the regional director's finding that DNI did not violate Section 8(a)(5) of the Act and did not unilaterally change the working conditions of the employees who held guaranteed jobs for life given that they were placed on unpaid leave, continued to retain their employee status, and might have returned to work upon giving DNI reasonable assurances that they will not engage in future "quickie" strike, the regional director's decision was upheld on appeal on April 14, 2000.

{¶28} The union filed additional charges on August 12, 1999 (case No. 9-CA-36981), and February 8, 2000 (case No. 9-CA-37385), the latter being amended on March 16, 2000. An administrative law judge found and the NLRB agreed that DNI had made several statements in connection with the strike that violated Section 8(a)(1), dealt directly with the drivers in violation of Section B(a)(5) and (1), laid off 13 drivers and withheld their bonuses in violation of

Section 8(a) (3) and (1), and refused to reinstate nine of the locked-out drivers in violation of Section 8(a)(3) and (1).

{¶29} The Sixth Circuit Court of Appeals upheld the NLRB judgment on all but one of its findings. In other words, the Court of Appeals held that DNI made several statements in connection with the strike that violated Section 8(a)(1), dealt directly with the drivers in violation of Section 8(a)(5) and (1), and refused to reinstate nine of the locked-out drivers in violation of Section 8(a)(3) and (1). The Court of Appeals reversed the NLRB finding that DNI had laid off 13 drivers and withheld their bonuses in violation of Section 8(a)(3) and (1).

{¶30} Both the NLRB and the Sixth Circuit Court of Appeals acknowledged the acting regional director's and general counsel's findings that the DNI's lock-out of employees between June 27, 1999, and December 27, 1999, was lawful.

{¶31} No impasse on the ongoing collective-bargaining negotiations between the parties occurred between June 27, 1999, and December 27, 1999.

STATEMENT OF THE CASE,

{¶32} While the NLRB charges were progressing, Local 957, on December 30, 1999, filed this action seeking to enforce the senior employees' guaranteed job rights. DNI removed the case to the United States District Court, where discovery and other activities were conducted. The district court in September 2002 remanded the case to this court, based on the court's conclusion that it did not have subject-matter jurisdiction over the parties' claims. Although the parties filed numerous motions and pleadings in this court, the matter was essentially stayed by agreement until the ongoing unfair-labor-practices proceedings and resulting Sixth Circuit case were completed. Eventually, the parties resumed active litigation in this court, including briefing on pending dispositive motions. This court by decision dated August 9, 2007, denied the parties'

motions to dismiss or for summary judgment on each party's claim against the other, finding that it has jurisdiction over the claims in this case and that there are genuine issues of fact that preclude summary judgment.

CONCLUSIONS OF LAW

{¶33} Section 301 of the Labor-Management Relations Act, Section 185, Title 29, U.S.Code provides that the federal district courts possess plenary jurisdiction over “[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce * * *.” The United States Supreme Court has recognized that the “unusually powerful pre-emptive force of Section 301, *Beneficial Natl. Bank v. Anderson*,² 539 U.S. 1, 7, places it in the small category of statutes that “not only pre-emp[t] state law but also authoriz[e] removal of actions that sought relief only under state law.” *Id.*, citing *Avco Corp. v. Aero Lodge No. 735. Internatl. Assn. of Machinists & Aerospace Workers* (1968), 390 U.S. 557.

{¶34} Section 301's sphere of complete preemption extends to state-law claims that are substantially dependent on analysis of a collective-bargaining agreement. *DeCoe v. Gen. Motors Corp.* (C.A.6, 1994), 32 F. 3d 212, 216. Therefore, if proof of a state-law claim requires interpretation of the terms of a collective-bargaining agreement and/or if the right claim by the plaintiff is created by the collective-bargaining agreement, rather than by state law, then the purported state law claim is preempted. *Id.*

{¶35} Proof of the plaintiff's stated breach-of-contract law claim in this case necessarily requires interpretation of the terms of the January 28, 1996 collective-bargaining agreement between DNI and the union. Moreover, the claim by plaintiff in this case—namely, the right to guaranteed lifetime employment of behalf of Brian Acton, Edgar Davenport, Dale Dorsten,

Martin Pulley, Peter Thomson, and Edward Wilke—is a right created solely by the collective-bargaining agreements between DNI and the union. It is not a right that would exist absent such an agreement by Ohio common law. To the contrary, Ohio common law provides for employment at will, not guaranteed lifetime employment, in the absence of an individual, express employment contract of definite duration. See, e.g., *Henkel v. Educational Research Council of Am.* (1976), 45 Ohio State 2d 249.

{¶36} The preemptive effect of Section 301 is not lost because this collective-bargaining agreement had expired. The U.S. Supreme Court had held that a Section 301 action may be maintained to redress the alleged violation of an expired collective-bargaining agreement when the parties' dispute arises out of the terms of the expired agreement. See *Nolde Bros., Inc. v. Local #358 Bakery & Confectionary Workers Union, AFL-CIO* (1977), 430 U.S. 243.

{¶37} In *Nolde Bros., Inc.*, the employer entered into a collective-bargaining agreement that contained a provision requiring the payment of severance pay upon the termination of the employment of employees with three or more years of active service. Once an employee had three years of active service, the Supreme Court reasoned, he had accrued the right to severance pay upon termination. The contract in *Nolde* was to remain in effect until July 21, 1973, and thereafter, until such time as either a new contract was executed or the existing agreement was terminated with appropriate notice. In May 1973, the parties began bargaining changes to the agreement, negotiations that continued up to, and beyond, the July 21 contract expiration date. Thereafter, the union served notice of its decision to cancel the contract; termination of the contract became effective August 27, 1973.

{¶38} After the cancellation of the contract, the employer in *Nolde* shut down operations at one of its facilities. The union demanded the severance pay detailed in the expired collective-

bargaining agreement, but the employer refused. The employer also refused to arbitrate the severance-pay claim on the grounds that its contractual obligation to arbitrate disputes terminated with the collective-bargaining agreement. The union sued under Section 301, seeking to compel arbitration of the severance-pay dispute, or in the alternative, judgment for the severance pay due.

{¶39} Observing that the parties' arguments demonstrate that both the union's claim for severance pay and the employer's refusal to pay it were based on "differing perceptions of a provision of the expired collective-bargaining agreement," the Supreme Court in *Nolde* noted that the resolution in the claim "hinges on the interpretation ultimately given the contract clause providing for severance pay. The dispute therefore, although arising after the expiration of the collective bargaining contract, clearly arises under that contract." *Nolde Bros., Inc.*, 430 U.S. at 249. The Supreme Court rejected the argument, like the one made by the union in this case, that the claim by the union could not be heard under Section 301 because the event giving rise to the claim, i.e., the employees' severance upon the closing of the facility, did not occur until after the expiration of the collective-bargaining agreement. *Id.*

{¶40} The Supreme Court later reaffirmed its decision in *Nolde Bros., Inc.* when, in *Litton Financial Printing Div. v. Natl. Labor Relations Bd.* (1991), 501 U.S. 190, 205-206, it explained, "A postexpiration grievance can be said to arise under the contract where it involves facts or occurrences that arose before expiration, or an action taken after expiration infringes a right that accrued or vested under the agreement, or where, under normal principles of contract interpretation, the disputed contractual right survives expiration of the remainder of the agreement."

{¶41} Similar to the situation in *Nolde*, the resolution of the union’s claim in the present case hinges on the interpretation ultimately given to the clause in a collective-bargaining agreement providing for guaranteed lifetime employment for certain individuals. Although the dispute arose after expiration of the labor contract—in *Nolde*, the facility was closed after the expiration of the contract, and here the guaranteed job holders were locked out and placed on unpaid leave after expiration of the contract—under the test articulated by the Supreme Court, the dispute arises under the contract. The dispute arises under the contract and is preempted by Section 301, because the disputed action (placement on unpaid leave after the lockout) that was taken after expiration allegedly infringes upon a right (guaranteed lifetime employment) that accrued or vested under the contract. See *Detroit Typographical Union v. Detroit Newspaper Agency* (C.A.6, 2002), 283 F.3d 779, 781-782, 787; *Cumberland Typographical Union No. 244 v. Times & Alleganian Co.* (C.A.4, 1991), 943 F. 2d 401, 404-405; *Chicago Typographical Union No. 16 v. Chicago Newspaper Publishers Assn.* (C.A.7, 1988), 853 F. 2d 506, 510. In *Nolde*, that accrued or vested right was the right to severance pay after three years of employment. Here, the accused or vested right is the right to guaranteed lifetime employment that was conferred by being a full-time employee employed by the company on September 24, 1992. In both cases, the rights at issue vested or accrued prior to the expiration of the labor agreement, notwithstanding that those rights allegedly were infringed upon after the contract expired. Consequently, Section 301 is the exclusive means to seek redress for the alleged violation of the contract, notwithstanding its expiration, and any purported state-law claim is preempted.

{¶42} In *San Diego Bldg. Trades Council v. Garmon* (1959), 359 U.S. 236, 245, the Supreme Court held that the NLRA preempts purported state-law claims that seek to redress

conduct that is “arguably subject to” the NLRA. In other words, when an employer engages in conduct that arguably might constitute an unfair labor practice under the NLRB, the exclusive means of redress is under federal law before the NLRB, thus precluding adjudication of the matter under state law. *Id.* at 245-246.

{¶43} The evidence adduced at trial shows that the parties were in the midst of collective-bargaining negotiations following the expiration of their most recent collective-bargaining agreement when the union engaged in a one-day strike in late June 1999. In response, the defendant engaged in a lockout of certain union employees and thereafter placed them on unpaid leave in early July 1999, a course of conduct that the union asserts violated the guaranteed-jobs provision in the expired labor agreement. In short, the parties were in the midst of a labor dispute surrounding the negotiation of a new collective-bargaining agreement to replace the expired labor contract, and the union is asserting a state-law claim in order to redress conduct that occurred within the context of those negotiations.

{¶44} In a remarkably similar case arising out of a strike during the negotiation of an expired collective-bargaining agreement, the plaintiff sued under state law claiming that the employer thereafter engaged in conduct that breached the labor contract. Rejecting the plaintiff’s claim, the U.S. Court of Appeals for the 6th Circuit affirmed the lower court’s grant of summary judgment in the defendant-employer’s favor, holding that the Ohio law breach-of-contract claim was preempted and properly dismissed. See *Slone v. Martin Marietta Energy Sys., Inc.* (C.A.6,1977), 1997 WL 139794, at *2-3. In *Slone*, the Court of Appeals followed *Garmon* and noted that “[a]n employer’s failure to honor the terms and conditions of the expired [collective bargaining] agreement while negotiations are pending constitutes bad faith bargaining in breach of Section 8 of the NLRA.” *Id.* at paragraph 7. “Therefore,” the Court of Appeals said

“a state law claim alleging conduct constituting a violation of the terms of a [collective bargaining] agreement after expiration, but before impasse, is preempted by the NLRA.” *Id.*

{¶45} As in *Slone*, through its breach of contract claims, the union is simply alleging that DNI acted contrary to the terms of the expired bargaining agreement, conduct that is arguably prohibited by Section 8 of the NLRA. Indeed, as in *Slone*, there is no dispute here that the union’s claim finds its genesis in the terms of the expired labor contract. Further, where the conduct of the parties in this case undisputedly centered around the negotiation of a new contract to replace the expired agreement, and even more specifically, where the union’s claim focuses on the employment status of certain union employees under the labor contract, resolution of the union’s contract claim as a matter of state law involves too great a danger of conflict with national labor policy. See *Garmon*, 359 U.S. at 246.

{¶46} In this case, DNI’s conduct arguably constituted an unfair labor practice under the NLRA—that is, an illegal lockout by placing the individual plaintiffs here on unpaid leave simply because they refused to give assurance that they would not honor future job actions by their union. The union, in fact, filed an unfair-labor-practice charge. It turned out that the regional director determined that the activity by DNI was not an unfair labor practice. The regional director and later general counsel agreed that DNI, due to the nature of its business, was permitted to lock out the plaintiffs to achieve some assurance of the forgoing of future strikes and was privileged to condition the return to work of the plaintiffs on some limitation of the union’s ability to strike, be it until the completed transition to the new facility or until the union accepted its contract proposal. So this issue was litigated in the labor-relations proceedings. It was litigated administratively and in federal court. The union lost on this situation.

{¶47} This court was aware that the administrative decisions were not favorable to the union at the summary judgment stage. This court was also aware at that stage that the administrative and federal court proceedings resulted in determinations that in some regards DNI had engaged in unfair labor practices. In the summary judgment context, the evidence must be construed most favorably to the nonmoving party. The court decided it was not appropriate to grant summary judgment to DNI when the evidence was to be construed most favorably to the union and there was evidence that the guaranteed-jobs provision was an undisputed component of the collective-bargaining agreement and DNI had engaged in unfair labor practices such as coercion, threats, and direct dealing. It was reasonable to conclude that there was an issue of fact, given this situation, even though the administrative process had resulted in a disposition that the lock-out itself was not an unfair labor practice.

{¶48} One could reasonably conclude in this situation that whichever decision is made, one party's labor relations rights would be enforced and the others ignored. In other words, the court could support the employees' right to strike and thus diminish the company's right to lockout. Or on the other hand, the court could enforce the right of DNI to lockout and effectively override the union's right to strike. Given the offset of the rights, perhaps the court should just enforce what the parties agreed to, and that is the guaranteed-jobs provision. That is what DNI agreed to, and that is what DNI should be bound by. The court does not find this approach appropriate. The court weighs the administrative decision directly on point on this issue against the implications from the findings of coercion, threats, and attempt to bypass the union and deal with the workers one on one. In the context of all the evidence, the court finds that the decision on this exact issue in the administrative process outweighs the implications from the findings of coercion, threats and direct dealing.

{¶49} The regional director found and the general counsel, eventual advocate for the union, conceded that DNI, due to the nature of its business, was permitted to lock out the drivers to achieve some assurance of the forgoing of future strikes and had the privilege to condition return to work on some limitation of the union's ability to strike. A decision of this nature eliminates the potential for conflict with national labor policy.

{¶50} Local 957's claim is not barred by failure to exhaust contractual remedies. DNI did not move in this litigation for the court to dismiss or stay the litigation to allow arbitration to proceed. DNI consistently took the position with regard to Local 957 and other bargaining units at the Dayton Daily News that grievances that arise after the expiration of a collective-bargaining agreement are not arbitrable. The union's demand to arbitrate would not have been honored. A party is not required to engage in a vain and useless act.

{¶51} Generally, a plaintiff must present evidence on several elements to successfully prosecute a breach-of-contract claim. Those elements include the existence of a contract, performance by the plaintiff, breach by the defendant, and damage or loss to the plaintiff. *Doner v. Snapp* (1994), 98 Ohio App.3d 597. The exhibits and the parties' stipulation indisputedly establish that there was a collective-bargaining agreement and a guaranteed-job provision as a part of that collective-bargaining agreement. So the first required element is clearly established.

{¶52} The second element is performance by the plaintiff. The plaintiffs have worked for DNI as truck drivers for many years. They were ready to work in the applicable period here of the second half of 1999. However, they refused to give DNI assurances that they would forgo striking and or give DNI forewarning of a strike. The process established by the National Labor Relations Act was pursued. Through that process, it was determined that DNI was entitled to some assurance of the forgoing of future strikes and that DNI could condition the privilege of

working on that assurance. These truck drivers refused to work and/or failed to work by not giving DNI an assurance it was entitled to as found by law and regulation. Under these circumstances, the plaintiffs failed to perform. The second required element of a breach-of-contract action is not established. The plaintiffs have failed to prove all the essential elements of their cause of action. The defendant did not breach here because it has been determined that the defendant was entitled to lock out under the circumstances that it did.

CONCLUSION

{¶53} Accordingly, it is found and concluded that plaintiff's cause of action for breach of contract is preempted and/or that the plaintiff has failed to establish all the required elements of breach of contract. Thus, judgment is entered in favor of defendant, Dayton Newspapers, Inc., and against plaintiff, General Truck Drivers, Chauffeurs, Warehousemen & Helpers Local Union No. 957, dismissing the complaint with prejudice. Costs to be paid by plaintiff.

So ordered: