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In the
United States Court of Appeals
For the Second Circuit

AUGUST TERM, 2019

ARGUED: FEBRUARY 13, 2020

DECIDED: SEPTEMBER 3, 2020

No. 19-1093-cv

AMERICAN FEDERATION OF MUSICIANS AND EMPLOYERS'
PENSION FUND, BOARD OF TRUSTEES OF THE AMERICAN
FEDERATION OF MUSICIANS AND EMPLOYERS' PENSION
FUND,

Plaintiffs-Appellees,

v.

NESHOMA ORCHESTRA AND SINGERS, INC..

Defendant-Third-Party Plaintiff-Appellant,

v.

ASSOCIATED MUSICIANS OF GREATER NEW YORK LOCAL 802,
AFM, AFL-CIO,

*Third-Party Defendant-Appellee.*¹

Appeal from the United States District Court
for the Southern District of New York.

¹ The Clerk of Court is directed to amend the caption as shown above.

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3 Before: WINTER, WALKER, and CARNEY, *Circuit Judges*.

4

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6 This appeal presents the questions of (1) whether arbitration
7 was properly initiated by defendant-appellant Neshoma Orchestra
8 and Singers, Inc. (Neshoma) in response to a claim against it for \$1.1
9 million in withdrawal liability by the American Federation of
10 Musicians and Employers' Pension Fund (Fund) and (2) whether
11 Neshoma's third-party claim against its union was preempted by the
12 National Labor Relations Act (NLRA).

13 Neshoma contends that the district court erred in granting
14 summary judgment against it. Neshoma maintains (1) that it had
15 timely demanded arbitration pursuant to 29 U.S.C. § 1401(a)(1) and
16 (2) that any failure to timely demand was excused because the
17 arbitration rules of the American Arbitration Association (AAA)
18 imposed preconditions to arbitration that were not fair or equitable.
19 We conclude that the parties were bound by the Fund rules, which
20 required Neshoma to initiate arbitration with the AAA by filing a
21 formal request before the statutory deadline, and Neshoma failed to
22 do so.

23 We also conclude that the district court did not err in
24 dismissing Neshoma's third-party complaint against the Union on

1 the pleadings as preempted by the NLRA. Accordingly, we affirm
2 the district court's judgment.

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4
5 Patricia McConnell (LEVY RATNER, P.C.), New
6 York, NY, *for Plaintiffs-Appellees*.

7 RAAB, STURM & GANCHROW, LLP (Ira A. Sturm, *on*
8 *the brief*), Fort Lee, NJ, *for Defendant-Third-Party*
9 *Plaintiff-Appellant*.

10 LAW OFFICE OF HARVEY S. MARS, LLC (Harvey
11 Steven Mars, *on the brief*), New York, NY, *for Third-*
12 *Party Defendant-Appellee*.

13
14
15 PER CURIAM :

16 This appeal presents the questions of (1) whether arbitration
17 was properly initiated by defendant-appellant Neshoma Orchestra
18 and Singers, Inc. (Neshoma) in response to this suit to recover \$1.1
19 million in withdrawal liability by the American Federation of
20 Musicians and Employers' Pension Fund (Fund) and (2) whether
21 Neshoma's third-party claim against its union was preempted by the
22 National Labor Relations Act (NLRA).

23 Neshoma contends that the district court erred in granting
24 summary judgment against it. Neshoma maintains (1) that it had
25 timely demanded arbitration pursuant to 29 U.S.C. § 1401(a)(1) and
26 (2) that any failure to timely demand was excused because the

1 arbitration rules of the American Arbitration Association (AAA)
2 imposed preconditions to arbitration that were not fair or equitable.
3 We conclude that the parties were bound by the Fund rules, which
4 required Neshoma to initiate arbitration with the AAA by filing a
5 formal request before the statutory deadline, and Neshoma failed to
6 do so.

7 We also conclude that the district court did not err in
8 dismissing Neshoma's third-party complaint against the Union on
9 the pleadings as preempted by the NLRA. Accordingly, we affirm
10 the district court's judgment.

11 **BACKGROUND**

12 The Fund is a multiemployer pension benefit plan under the
13 Employee Retirement Income Security Act (ERISA). Neshoma, a
14 band represented by Associated Musicians of Greater New York
15 Local 802, AFM, AFL-CIO (Union), made pension contributions to the
16 Fund on behalf of Neshoma's employees who were Union members.
17 The parties negotiated a collective bargaining agreement (CBA)
18 providing that "Neshoma agree[d] to be bound by the Agreement and
19 Declaration of Trust . . . which is incorporated by reference into this
20 Agreement."² The Agreement and Declaration of Trust, which

² *Neshoma Orchestra and Singers, Inc. v. Am. Fed'n of Musicians and Employers' Pension Fund*, No. 17-cv-02640-JGK (S.D.N.Y. Dec. 8, 2017), ECF No. 38-5, at 6 art. V § 4.

1 governed the Fund, in turn, granted “[t]he Trustees . . . full authority
2 to adopt rules and regulations governing the determination and
3 payment of withdrawal liability, consistent with the statute and any
4 governmental regulations promulgated under it”; it further
5 provide[d] that “such rules and regulations adopted by the Trustees
6 shall be binding on all Employers.”³ The rules and regulations
7 concerning withdrawal liability (the Fund rules) provide that “the
8 employer may initiate a binding arbitration regarding the assessment
9 *by making a formal filing with the American Arbitration Association.*”⁴

10 As part of their CBA, the parties agreed that any arbitration
11 would be filed with and therefore governed by the AAA rules, which,
12 as relevant here, required Neshoma to send the AAA a \$8,200 filing
13 fee in order to initiate arbitration. On July 31, 2009, the CBA between
14 Neshoma and the Union expired, however the terms of the agreement
15 remained in force until a new agreement would be reached. After
16 years of failed renewal negotiations, Neshoma stopped making
17 pension contributions in July 2012.

18 By letter dated August 27, 2015, the Fund notified Neshoma
19 that, as of June 8, 2013, Neshoma had effected a complete withdrawal
20 from the Fund and therefore was liable for withdrawal liability in the
21 amount of \$1,111,124. The Fund demanded payment and informed

³ *Id.*, ECF No. 38-3, at 62 § 13.1.

⁴ App’x 51 (emphasis added).

1 Neshoma of its right, under 29 U.S.C. § 1399(b)(2)(A), to request
2 review of the assessment within 90 days.

3 By a letter dated August 31, 2015, Neshoma disputed its
4 withdrawal from the Fund and contended that the payment demand
5 was excessive. Neshoma also argued that the Fund's assessment of
6 withdrawal liability should be rescinded under the "labor dispute"
7 exception in 29 U.S.C. § 1398. Neshoma also "demand[ed]"
8 commencement of arbitration proceedings.⁵

9 On September 21, 2015, the Fund responded to Neshoma,
10 stating that it considered Neshoma's August 31, 2015 letter to be a
11 request for review under 29 U.S.C. § 1399(b)(2)(A). The Fund
12 confirmed its determination that Neshoma had withdrawn from the
13 Fund and that the sought-after payment amount was correct. This
14 letter began a 60-day clock for Neshoma to initiate arbitration under
15 29 U.S.C. § 1401(a)(1)(A), which expired on November 20, 2015.

16 On January 11, 2016, Neshoma sent the AAA a request to
17 arbitrate the Fund's assessment and a check for \$275.00. By letter
18 dated March 2, 2016, the Fund informed Neshoma that it had not paid
19 the first two installment payments on the assessment (which came
20 due on October 26, 2015) and that if payment was not received within
21 60 days after receipt of the letter, Neshoma would be in default under
22 29 U.S.C. § 1399(c)(5) which triggered the Fund's right to immediate

⁵ App'x 62.

1 payment. Neshoma has never made any payments. On April 12, 2017,
2 the Fund brought this action to collect the withdrawal liability
3 amount.

4 Meanwhile, Neshoma and the Union were in the process of
5 negotiating a successor CBA to the one that expired on July 31, 2009.
6 Neshoma filed a third-party complaint against the Union, alleging
7 that during a negotiation held on October 7, 2015, the Union's
8 counsel, Harvey Mars, promised that if Neshoma entered into a new
9 CBA, the Union would ensure that the Fund would expunge the
10 claimed withdrawal liability assessment. Neshoma argued that, in
11 reliance on this promise, it executed the proposed successor CBA, but
12 that the Union did not honor this promise.

13 On May 23, 2018, the district court granted the Fund partial
14 summary judgment in the full amount, holding that Neshoma had
15 failed to timely initiate arbitration, fixing the amount of withdrawal
16 liability and precluding Neshoma's ability to challenge it. The district
17 court also dismissed the amended third-party complaint against the
18 Union, finding that Neshoma's claim was preempted by the NLRA.

19 DISCUSSION

20 On appeal, Neshoma argues that it did, in fact, comply with
21 "the statutory and regulatory requirements for commencing an
22 ERISA arbitration to contest the assessment," and, in the alternative,
23 because the AAA's arbitration procedures were not "fair and

1 equitable,” Neshoma was not required to timely invoke arbitration.⁶
2 Neshoma also argues that the NLRA does not apply to its third-party
3 action against the Union, which therefore should not have been
4 dismissed as preempted.

5 Our standard of review for both motions to dismiss and
6 motions for summary judgment is *de novo*.⁷

7 I. Whether Neshoma Properly Initiated Arbitration

8 ERISA provides that “[a]ny dispute between an employer and
9 the plan sponsor of a multiemployer plan concerning a determination
10 [of withdrawal liability] made under sections 1381 through 1399 of
11 this title shall be resolved through arbitration.”⁸ This Circuit has held
12 that “[d]isputes over withdrawal liability determinations are to be
13 resolved by arbitration, as provided in 29 U.S.C. § 1401(a)(1).”⁹ ERISA
14 provides that, after receiving a pension fund’s notice of withdrawal-
15 liability assessment and demand for payment, an employer has 90

⁶ Appellant’s Br. at 17, 19.

⁷ *Miller v. Wolpoff & Abramson, L.L.P.*, 321 F.3d 292, 300 (2d Cir. 2003) (citing *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152 (2d Cir. 2002) (motion to dismiss); *Mario v. P & C Food Markets, Inc.*, 313 F.3d 758, 763 (2d Cir. 2002) (summary judgment)).

⁸ 29 U.S.C. § 1401(a)(1).

⁹ *ILGWU Nat. Ret. Fund v. Levy Bros. Frocks*, 846 F.2d 879, 881 (2d Cir. 1988).

1 days to ask the fund to review the assessment and schedule of
2 payments.¹⁰

3 Following this request for review, ERISA sets forth a schedule
4 for an employer to initiate¹¹ arbitration to challenge the withdrawal
5 liability assessment as follows:

6 Any dispute between an employer and the plan
7 sponsor of a multiemployer plan concerning the
8 determination made under sections 1381 through
9 1399 of this title shall be resolved through arbitration.

10 Either party may initiate the arbitration proceedings
11 within a 60-day period after the earlier of:

12 (A) the date of notification to the employer
13 under section 1399(b)(2)(B) of this title, or

14 (B) 120 days after the date of the employer's
15 request under section 1399(b)(2)(A) of this title.

¹⁰ 29 U.S.C. § 1399(b)(2)(A).

¹¹ In support of its position, Neshoma also points to 29 C.F.R. § 4221.3, a Labor Department regulation interpreting ERISA. We do not view this regulation as relevant here. Although it generally discusses the initiation of arbitration, it does not define "initiation," and it therefore does not advance the analysis.

1 The parties may jointly initiate arbitration within the 180-
2 day period after the date of the plan sponsor’s demand
3 under section 1399(b)(1) of this title.¹²

4 In the event arbitration is not initiated, the withdrawal liability
5 becomes “due and owing” as set forth in the plan sponsor’s payment
6 schedule and the plan sponsor may bring a collection action in
7 court.¹³ Moreover, this Circuit has held that we will not
8 “disregard the clear language of the statute in order to relieve the
9 Company of the consequences of its failure to meet the time
10 limitations imposed by the Act.”¹⁴ “Congress intended that disputes
11 over withdrawal liability would be resolved quickly, and established
12 a procedural bar for employers who fail to arbitrate disputes over
13 withdrawal liability in a timely manner.”¹⁵

14 Neshoma first contends that its August 31, 2015 letter was
15 sufficient to initiate arbitration and, thus, the district court lacked
16 jurisdiction. In the alternative, Neshoma argues that the AAA

¹² 29 U.S.C. § 1401(a)(1).

¹³ See *Div. 1181 Amalgamated Transit Union-New York Employees’ Pension Fund v. Logan Transp. Sys., Inc.*, 293 F. Supp. 3d 336, 346 (E.D.N.Y. 2018) (citation omitted).

¹⁴ *New York State Teamsters Conference Pension & Ret. Fund v. McNicholas Transp. Co.*, 848 F.2d 20, 23–24 (2d Cir. 1988).

¹⁵ *ILGWU Nat. Ret. Fund*, 846 F.2d at 887 (citing 29 U.S.C. § 1401(b)(1)).

1 procedures are not fair nor equitable and, therefore, are
2 unenforceable. These arguments are without merit.

3 In that letter, the relevant language stated:

4 Should the Pension Fund not withdraw its demand for
5 payment of withdrawal liability based upon the labor
6 dispute exception, please consider this letter as a demand
7 for arbitration as to the issue of liability and the calculation
8 of liability. Please provide me with the procedures for the
9 actual arbitration as I have been unable to locate same.¹⁶

10 We easily conclude that Neshoma failed to timely initiate
11 arbitration.

12 First, the agreed-upon rules in the pension agreement between
13 the parties require that any arbitration demand must be filed with the
14 AAA, which Neshoma did not do until January 2016, nearly two
15 months after the November statutory deadline. Furthermore, it is
16 undisputed that Neshoma was aware of this requirement the
17 previous September. The Fund had attached a copy of the rules to its
18 September 21, 2015 letter which expressly stated that the “Fund’s
19 rules require use of the American Arbitration Association and specify
20 that arbitration may be initiated only by a formal filing with the
21 AAA.”¹⁷

¹⁶ App’x 62.

¹⁷ App’x 66.

1 Neshoma cites numerous cases to press its argument that its
2 August 31, 2015 letter met the “minimal requirements” of an
3 arbitration demand.¹⁸ All of the cases are inapposite, however, and
4 further undermine Neshoma’s contention. Unlike Neshoma, the
5 party seeking arbitration in those cases did not initially agree to be
6 bound by the Fund rules, which specify that the demand for
7 arbitration be sent to the AAA. In fact, the cases make clear that, while
8 29 U.S.C. § 1401(a)(1) does not *require* parties to initiate arbitration
9 pursuant to the AAA rules, courts will find that the parties failed to
10 initiate arbitration “where the trust funds’ rules specifically required
11 the employer to initiate arbitration pursuant to AAA rules.”¹⁹
12 Neshoma does not address the critical distinction between parties
13 who have initially agreed to initiate arbitration by “making a formal
14 filing” with the AAA and those who have not.²⁰ If an employer has

¹⁸ See *Div. 1181 Amalgamated Transit Union-New York Employees Pension Fund*, 293 F. Supp. 3d 336; *Operating Eng’rs’ Pension Tr. Fund v. Fife Rock Prods. Co.*, No. C 10-697 SI, 2011 U.S. Dist. LEXIS 9045, 2011 WL 227665 (N.D. Cal. Jan. 24, 2011); *Teamsters-Employers Local 945 Pension Fund v. Waste Mgmt. of N.J., Inc.*, Civil No. 11-902 (FSH), 2011 U.S. Dist. LEXIS 59090, 2011 WL 2173854 (D.N.J. June 2, 2011).

¹⁹ *Operating Eng’rs’ Pension Tr. Fund*, 2011 WL 227665, at *5; see also *Div. 1181 Amalgamated Transit Union-New York Employees Pension Fund*, 293 F. Supp. 3d at 351 (finding that employers had, in fact, timely filed a demand for arbitration with the AAA).

²⁰ App’x 51. Neshoma also devotes a large portion of its brief to argue that “Once Neshoma Demanded Arbitration the Court Was Stripped of Jurisdiction.” Appellant’s Br. at 27. Neshoma’s argument is based on its false claim that the “Lower Court accepted that Neshoma, by letter dated August 31, 2015, demanded arbitration.” *Id.* at 29. Judge Koeltl did no such

1 committed by contract to use a certain procedure to initiate
2 arbitration, then it must follow that procedure or suffer the
3 consequences.

4 In the alternative, Neshoma argues that the \$8,200 fee was
5 unfair and inequitable and therefore excused its untimely demand
6 for arbitration. The district court rightly noted that any defects in the
7 procedures or the “AAA fee does not excuse Neshoma’s failure to file
8 a timely demand for arbitration together with a payment of whatever
9 portion of the fee it could afford.”²¹ Had Neshoma timely filed with
10 the AAA and submitted its filing with a lower payment amount, this
11 issue would be properly before us.

12 In sum, we conclude that, in the ERISA context, the parties
13 must comply with the arbitration rules specified in their agreement.
14 Here, Neshoma failed to comply with its obligations under the
15 agreed-upon Fund rules to timely initiate arbitration. We, therefore,
16 AFFIRM.

17 **II. Neshoma’s Third Party Complaint Against the Union**

18 Neshoma argues that the Union made material
19 misrepresentations during collective bargaining negotiations.

thing. We do not address this argument because the district court did not
err in finding that Neshoma had not appropriately demanded arbitration.

²¹ *Am. Fed’n of Musicians & Employers’ Pension Fund v. Neshoma Orchestra & Singers, Inc.*, No. 17-CV-2640 (JGK), 2018 WL 2341551, at *6 (S.D.N.Y. May 23, 2018).

1 Specifically, Neshoma alleges that the Union’s counsel stated that the
2 withdrawal liability assessment would “go away” if Neshoma agreed
3 to the terms of the new collective bargaining agreement with the
4 Union.²² Neshoma argues that the district court erred in granting the
5 Union’s motion to dismiss on the basis that, because the claim was
6 preempted by the NLRA, the district court lacked subject matter
7 jurisdiction.²³ Neshoma contends that the NLRA does not apply to its
8 complaint against the Union and, therefore, the district court erred in
9 granting the Union’s motion to dismiss.

10 Neshoma argues that because this matter does not involve
11 “wages, hours, and other conditions of employment” the NLRA does
12 not preempt the dispute. Neshoma also argues that the NLRA does
13 not apply because the agreement at issue is not covered by the NLRA.
14 Both arguments are unavailing.

15 Section 8 of the NLRA describes the “unfair labor practices”
16 over which the National Labor Relations Board (NLRB) has
17 jurisdiction. These include violations of the obligation to “bargain
18 collectively,”²⁴ which it defines as follows:

²² App’x 35 ¶¶ 78-80.

²³ We refer to Neshoma’s state law claims as a single claim because they are all premised on the same allegedly bad-faith promise by the Union.

²⁴ 29 U.S.C. § 158(b)(3).

1 to bargain collectively is the performance of the mutual
2 obligation of the employer and the representative of the
3 employees to meet at reasonable times and *confer in good*
4 *faith* with respect to wages, hours, and other terms and
5 conditions of employment, or the negotiation of an
6 agreement, or any question arising thereunder, and the
7 execution of a written contract incorporating any
8 agreement reached if requested by either party²⁵

9 First, Neshoma ignores the context in which the alleged
10 fraudulent statements were made: during the course of collective
11 bargaining and under the mandate that the parties bargain in good
12 faith. Collective bargaining agreements specify the working
13 conditions of employees and the NLRB has routinely recognized
14 unfair labor practices for bad-faith bargaining during collective
15 bargaining negotiations.²⁶ Assuming the allegations are true, as we
16 are required to do on a motion to dismiss, the Union made deliberate
17 misrepresentations (*e.g.*, “[e]verything will go away”²⁷) regarding the
18 withdrawal liability provided Neshoma signed the renewal
19 agreement, this would certainly indicate bad-faith bargaining in
20 violation of 29 U.S.C. § 158(b)(3), (d).

²⁵ *Id.* § 158(d) (emphasis added).

²⁶ *See, e.g., Avila Grp., Inc.*, 218 NLRB 633, 634 (1975).

²⁷ App’x 35 ¶ 79.

1 Therefore, we agree with the district court that Neshoma’s
2 claim that “the Union made a bad faith promise – namely, a promise
3 to ensure that the assessment of withdrawal liability against Neshoma
4 would be rescinded – in order to induce Neshoma to sign a renewal
5 agreement . . . is identical to one that could have been presented to the
6 NLRB.”²⁸ The alleged misconduct, at a minimum, fell within the
7 ambit of Section 8 of the NLRA and thus was preempted.²⁹ Therefore,
8 the district court lacked subject matter jurisdiction over Neshoma’s
9 claim, which grew out of an allegedly bad-faith promise made during
10 collective bargaining.³⁰ The NLRA gives the NLRB exclusive
11 jurisdiction over such a claim.

²⁸ *Am. Fed’n of Musicians & Employers’ Pension Fund v. Neshoma Orchestra & Singers, Inc.*, No. 17-CV-2640 (JGK), 2018 WL 2338764, at *3-4 (S.D.N.Y. May 23, 2018), *appeal withdrawn sub nom. Neshoma Orchestra & Singers, Inc. v. Associated Musicians of Greater New York Local 802, AFM, AFL-CIO*, No. 18-1884, 2018 WL 4627066 (2d Cir. Aug. 21, 2018).

²⁹ *See San Diego Bldg. Trades Council, Millmen’s Union, Local 2020 v. Garmon*, 359 U.S. 236, 245 (1959) (“When an activity is arguably subject to s 7 or s 8 of the 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.”).

³⁰ *See, e.g., Talbot v. Robert Matthews Distrib. Co.*, 961 F.2d 654, 661 (7th Cir. 1992) (“The plaintiffs’ common law fraud and misrepresentation claim against the defendants is identical to a claim which could have been pursued before the NLRB.”); *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1516–17 (11th Cir. 1988) (noting that plaintiffs “raise[d] claims that are in substance allegations that the Company breached its duty to bargain in good faith in negotiating the concessions”); *Serrano v. Jones & Laughlin Steel Co.*, 790 F.2d 1279, 1286 (6th Cir. 1986) (“No matter how it is stated, the gravamen of the three fraud charges is that J & L did not bargain in good faith in obtaining concessions from the Union in the July agreement.”).

1 Neshoma's second argument is that the Union did not
2 represent a majority of the employees at the time of the negotiations
3 and, thus, any negotiations could not amount to collective bargaining
4 subject to the NLRA. The district court correctly rejected this
5 argument.

6 An April 2014 agreement signed by Neshoma and the Union
7 recognized the Union as the sole and exclusive bargaining
8 representative for all musicians employed by Neshoma. This written
9 acknowledgement was sufficient evidence that the Union enjoyed
10 status as the exclusive bargaining agent.³¹ Further, the district court
11 rightly noted that the April 2014 agreement refers to the former
12 agreement between the parties as a "collective bargaining agreement"
13 and, accordingly, there is a "rebuttable presumption of majority
14 status '[a]t the end of the certification year or upon expiration of the
15 collective-bargaining agreement.'"³² On appeal, Neshoma does not
16 point to any evidence to support its contention that the Union was not
17 the exclusive bargaining agent. Thus, we easily conclude that the
18 district court did not err in holding that the NLRA applied to the

³¹ *Am. Fed'n of Musicians & Employers' Pension Fund*, 2018 WL 2338764, at *4.

³² *Id.* (quoting *Auciello Iron Works, Inc. v. N.L.R.B.*, 517 U.S. 781, 786 (1996)).

1 claim in the third party-complaint and that the claim was, therefore,
2 preempted.

3 In sum, we hold that the district court did not err in its well-
4 reasoned opinions. Neshoma did not timely demand arbitration and
5 the NLRA preempts its claim that the Union bargained in bad faith.
6 Accordingly, we AFFIRM.

7 CONCLUSION

8 For the reasons stated above, we AFFIRM the judgment of the
9 district court.