

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 2, 1994 Decided January 27, 1995

No. 93-5260

TRANSCAPITAL FINANCIAL CORPORATION
AND AMERICAN CAPITAL CORPORATION,
APPELLANTS

v.

DIRECTOR, OFFICE OF THRIFT SUPERVISION,
AS SUCCESSOR TO THE FEDERAL HOME LOAN BANK BOARD,
IN HIS OFFICIAL CAPACITY
AND THE FEDERAL DEPOSIT INSURANCE CORPORATION,
AS SUCCESSOR TO FEDERAL SAVINGS & LOAN
INSURANCE CORPORATION,
APPELLEES

On Appeal from the United States District Court
for the District of Columbia
(No. 90cv1678)

Vincent J. Colatriano argued the cause for appellants. With him on the briefs was *Charles J. Cooper*. *Michael A. Carvin* and *Robert J. Cynker* entered their appearance for appellants.

Douglas Letter, Counsel, United States Department of Justice, argued the cause for appellees. With him on the briefs were *Frank W. Hunger*, Assistant Attorney General, *Eric H. Holder, Jr.*, United States Attorney, *Edward T. Swaine*, Attorney, United States Department of Justice; *Douglas H. Jones*, Acting General Counsel, and *Thomas A. Schulz*, Assistant General Counsel, Federal Deposit Insurance Corporation; *Thomas J. Segal*, Deputy Chief Counsel, *Aaron B. Kahn*, Assistant Chief Counsel, and *Kerry W. Kircher*, Attorney, Office of Thrift Supervision.

Before SILBERMAN, BUCKLEY and TATEL, *Circuit Judges*.

Opinion for the Court filed PER CURIAM.

PER CURIAM: Appellants Transcapital Financial Corporation and American Capital Corporation, holding companies of the now-defunct Transohio Savings Bank, challenge the district

court's dismissal with prejudice of appellants' takings claim against the Office of Thrift Supervision ("OTS") and the Federal Deposit Insurance Corporation ("FDIC"). The FDIC cross-appeals the district court's dismissal without prejudice of appellants' contract claims against it. We initially disposed of this appeal in an unpublished memorandum issued November 23, 1994. Appellants then moved for publication, arguing that the decision clarifies this court's previous opinion in the same case, *Transohio Savings Bank v. Director, Office of Thrift Supervision*, 967 F.2d 598 (D.C. Cir. 1992). We will not repeat the extended statement of the facts found in the *Transohio* opinion. See *id.* at 600-06.

In *Transohio* we explained that the *Ramirez* exception (see *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1527 (D.C. Cir. 1984) (en banc), *vacated on other grounds*, 471 U.S. 1113 (1985)) permitted a United States District Court to exercise jurisdiction over a takings claim for *injunctive* relief when the monetary compensation available exclusively in the Federal Court of Claims would be wholly inadequate to compensate the complainant for the alleged taking. 967 F.2d at 613. We found no need for the district court to decide on remand whether Appellants' takings claim against the OTS and the FDIC fell within this jurisdictional exception, however, because we had independently determined that in any event Appellants could not prevail on the merits of their takings claim for injunctive relief. *Id.* at 613-14.

On remand, the district court nevertheless determined that it had jurisdiction over Appellants' takings claim, citing our discussion of the *Ramirez* exception. But by the time of the district court's jurisdictional determination, the OTS had placed Transohio Savings Bank into receivership, thereby rendering moot Appellants' claims for injunctive relief. Therefore, the *Ramirez* exception simply could not apply.

Appellees do not appear to contest this analysis, as they do not argue that the district court's resolution of the jurisdictional issue was correct. Rather, they argue only that the proper resolution of the jurisdictional issue is "unclear," both because of this Court's *Transohio* decision and because of the Supreme Court's decision last Term in *FDIC v. Meyer*, ___ U.S. ___, 114 S. Ct. 996 (1994). Appellees therefore urge this court to "bypass" the issue of jurisdiction and affirm the district court's

judgment in their favor because in light of the *Transohio* opinion "a "decision on the merits is ... foreordained' " (quoting *Secretary of the Navy v. Avrech*, 418 U.S. 676, 678 (1974); see *Burlington Northern R.R. Co. v. ICC*, 985 F.2d 589, 593 (D.C. Cir. 1993)).

As we explained above, any uncertainty that may have existed at the time of our *Transohio* decision over whether the *Ramirez* exception sufficed to establish district court jurisdiction over Appellants' takings claim for injunctive relief has now been completely eliminated. That Appellants' complaint also contained an alternative prayer for rescission, restitution and "other and further relief" is not material to our analysis of whether *Ramirez* could have provided a basis for district court jurisdiction after the bank's seizure. These alternatives did not pertain to Appellants' takings claim, which sought only prospective relief. For purposes of this appeal, we reject the argument that *Meyer* renders the jurisdictional issue so complicated that we should proceed to the merits.

We also note that precisely because the United States District Courts do not have jurisdiction over takings claims for compensation in excess of \$10,000, our prior *Transohio* decision did not limit, and indeed could not have limited, Appellants' right to seek compensation in the Federal Court of Claims. Rather, the takings analysis in the *Transohio* opinion, including the statement that "Transohio cannot prevail on its takings claim on the merits," 967 F.2d at 614, was solely concerned with Appellants' ability to obtain *injunctive* relief, as is evident from the opinion's repeated explanations that Transohio "did not receive from the banking regulators a right that defeats Congress' power to change the law on goodwill accounting." *Id.* at 613; see *id.* at 601, 624. That analysis has no bearing one way or the other on the merits of Appellants' claim for *compensation* in the Federal Court of Claims.

Accordingly, we vacate the district court's judgment in favor of Appellees on the merits of Appellants' takings claim, and we remand the case with instructions to dismiss the takings claim without prejudice for lack of subject-matter jurisdiction. We also reject the FDIC's efforts to cross-appeal the district court's dismissal without prejudice of Appellants' contract claim against the FDIC. Such an appeal is not proper in the absence of a notice of cross-appeal, as the FDIC admits, and we will not waive this requirement in these circumstances. Whatever technical deficiencies may

have existed in the district court's apparent failure to comply with the separate judgment rule, *see* Fed. R. Civ. P. 58 and 79(a), this failure did not give rise to the confusion and uncertainty that we relied upon in waiving the cross-appeal notice requirement in *Spann v. Colonial Village, Inc.*, 899 F.2d 24, 33 (D.C. Cir.), *cert. denied*, 498 U.S. 980 (1990).

So ordered.

ROGERS, *Circuit Judge*, concurring: On rehearing, the court reaffirms that the appropriate time for determining the requisite relatedness of the complaint and charge allegations is at the time the complaint is filed. In so doing, the court also emphasizes the perils for the Board of relying on boilerplate language, albeit this time with regard to the complaint in addition to the charge. *Cf. Lotus Suites, Inc. v. NLRB*, 32 F.3d 588, 592 (D.C. Cir. 1994); *G.W. Galloway Co. v. NLRB*, 856 F.2d 275, 278 (D.C. Cir. 1988). Absent allegations on the face of the complaint that make apparent their factual relationship to the allegations in a timely charge, the court holds that the Board's decision in *Nippondenso Mfg. U.S.A., Inc.*, 299 N.L.R.B. 545 (1990), bars it from relying on legal theory alone to link untimely complaint allegations.

Before the original panel, the Board's counsel "all but conceded" that the Board no longer approves of its reasoning in *Nippondenso*. *Drug Plastics & Glass Co. v. NLRB*, 30 F.3d 169, 174 (D.C. Cir. 1994) (*Drug Plastics I*). New counsel for the Board candidly acknowledged on rehearing that *Nippondenso* is alive and well but asserted that it is distinguishable. Such distinctions as are urged—*see id.* (discharged employee in *Nippondenso* was only peripherally subject to § 8(a)(1) violations alleged in the complaint, and the complaint did not refer to charge conduct)—however, do not substitute for a statement in the complaint indicating the requisite nexus between its factual allegations and those in the charge. *See Galloway*, 856 F.2d at 280 (requiring a "significant factual affiliation" between complaint and charge allegations); *Nippondenso*, 299 N.L.R.B. at 545. The charge refers only to Matthews' discharge and his union activities; it neither alleges a pattern of anti-union activities by the employer nor that Matthews' discharge was part of such activities. The complaint, in turn, while including the charge allegation regarding Matthews' discharge, does not

allege that Matthews' discharge was related to the conduct that is the basis for the added statutory violations. Its boilerplate allegations—Complaint paragraphs 12 and 13—assert that each of the acts complained of constituted a statutory violation; they do not indicate that the charge acts and added complaint acts are related to each other.¹

Missing from the charge and complaint is the factual relatedness required by § 10(b), *see* 29 U.S.C. § 160(b) (1988), that is present, for example, in the Board's post-*Nippondenso* decision in *Waste Management of Santa Clara County*, 308 N.L.R.B. 50, 50 & n.2 (1992).² The court does not suggest that the facts as found by the Board fail to show factual relatedness. Indeed, as shown in *Drug Plastics I*, 30 F.3d at 174, Matthews, as an employee, was personally subject to most of the § 8(a)(1) conduct alleged in the complaint. The problem arises because the proper focus for determining § 10(b) factual relatedness is on the allegations in the complaint, and the complaint here does not attempt to allege the factual relatedness of its allegations to those in the charge. Under *Nippondenso*, the vacuum cannot be filled by legal theory. Consequently, notwithstanding inclusion in the instant complaint of the charge allegation regarding Matthews' discharge, the Board may not rely on a relationship between the charge allegations and the complaint allegations that is not apparent

¹The one possible exception is in Paragraph 13, referring to both Matthews' discharge (Paragraph 11) and the wage increase complaint allegation (Paragraph 10). But, the Board dismissed the wage increase allegation and, hence, neither it nor Matthews' discharge are part of the enforcement order at issue.

²In *Waste Management*,

[t]he charge consisted of specific allegations of unlawful grants of wage increases and threats of retaliation against employees for their support of the Union; but it referred to these as part of [the employer's] "interfer[ence] with the freedom of the employees to make a fair choice of representation" during "the course of an election campaign...." Although the complaint alleged acts of interference different from those specifically alleged in the charge, the reference in the charge to [the employer's] interference with the particular organizational campaign was sufficient to support the complaint allegations that [the employer] sought to undermine and discourage employee support for the Union by interrogating employees, soliciting grievances and impliedly promising to remedy them, and soliciting employees to campaign against the Union.

308 N.L.R.B. at 50. The Board noted that *Nippondenso* did not compel dismissal of the complaint because in that case "neither the allegations of the charge nor the complaint placed at issue acts that were all part of an overall plan to resist union organization." *Id.* n.5.

in either the charge or the complaint.

It is thus crucial to recognize that this case hinges on a defect in the complaint, rather than on the facts themselves. It may well be that the additional claims in the complaint are sufficiently related to the charge regarding Matthews' discharge in that they were all "part of an overall plan to resist union organization."³ *Waste Management*, 308 N.L.R.B. at 50 (quoting *Well-Bred Loaf, Inc.*, 303 N.L.R.B. 1016, 1016 n.1 (1991)). However, because relatedness must be determined from the face of the charge and complaint, and because those documents in the instant case do not indicate any relationship between the alleged discharge and the additional claims in the complaint, the additional claims are untimely.

³To this extent the instant case differs from *Galloway*. While the court points out the close temporal relationship between the charge and complaint allegations in *Galloway*, the additional allegation in the *Galloway* complaint was not factually related to the allegation in the charge, 856 F.2d at 278 & n.21, because they had no more in common than that they concerned the same employer and occurred at the same location. *Id.* at 280. In the instant case, the allegations were more factually related because they involve the same employee and the same anti-union campaign. However, this factual relatedness is irrelevant to our inquiry because it is not apparent on the face of the charge and the complaint.