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Amicus Curiae Brief—Todd v. McNeff

No. 81-2150
IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1981

JIM McNEFF, INC.,
a California Corporation,
Petitioner,
vs.
FRANK L. TODD, *et al.*,
Respondents.

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

BRIEF FOR LOYOLA OF LOS ANGELES LAW REVIEW AS *AMICUS CURIAE*

The Loyola of Los Angeles Law Review as *amicus curiae* respectfully submits this brief in support of Frank L. Todd, respondent. The Loyola Law Review urges this Court to affirm the decision of the United States Court of Appeals for the Ninth Circuit in *Todd v. Jim McNeff, Inc.*, 667 F.2d 800 (9th Cir. 1982). Consent to the filing of this Brief has been received from counsel for both the petitioner and the respondent and has been filed with the Clerk of this Court.

STATEMENT OF INTEREST

The Loyola of Los Angeles Law Review's interest in filing this brief lies in encouraging students as well as members of the bar to contribute in the development of labor relations and employment law.

Todd v. Jim McNeff, Inc. came to the Law Review's attention as part of the Law Review's annual Ninth Circuit Labor Law Survey.

The split among the circuits on section 8(f) prehire agreement enforceability brought to light in the *McNeff* decision sparked the Law Review's desire to express itself on the issue. This brief provides the opportunity for that expression.

SUMMARY OF THE ARGUMENT

Prehire agreement wage and benefit provisions need to be enforced: a construction industry employer must know his labor costs; an employee must know his basic terms of employment. Once signed, prehire agreement wage and benefit terms should be enforced until NLRB election result certification.

The filing of a section 9(c) or (e) representation petition should not by itself disrupt the enforceability of prehire wage and benefit terms.

The courts provide the proper enforcement forum.

ARGUMENT

I. SECTION 8(f) PREHIRE AGREEMENT WAGE AND BENEFIT TERMS ARE ENFORCEABLE FROM AGREEMENT INCEPTION UNTIL NLRB ELECTION RESULT CERTIFICATION.

A. *Section 8(f) Legislative History Calls for Enforceable Wage and Benefit Provisions.*

Wage and benefit provisions are fundamental to the employment relationship. *See Curtiss-Wright Corp. v. NLRB*, 347 F.2d 61, 69 (3d Cir. 1965). In the construction industry, reaching early agreement on wage and benefit terms is of particular importance. Moreover, the construction industry employer needs to know his labor costs before he can bid accurately. Congress recognized the particular concerns of the construction industry when it authorized prehire agreements: "One reason for this practice is that it is necessary for the employer to know his labor costs before making the estimate upon which his bid will be based. A second reason is that the employer must be able to have available a supply of skilled craftsmen ready for quick referral." Senate Comm. on Labor and Public Welfare, Labor-Management Reporting and Disclosure Act of 1959, Sen. Rep. No. 187, 86th Cong., 1st Sess. 28 (hereinafter cited as "Sen. Rep."), *reprinted in* 1 NLRB, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, at 424 (1959) (hereinafter cited as "Leg. Hist."); *see NLRB v. Iron Workers*, 434 U.S. 335, 348 (1978).

Thus, prehire agreements were permitted in order to facilitate ac-

curate bidding practices by employers and a ready access to union hiring halls. If prehire agreements were to be held unenforceable *ab initio*, then neither of the two legislative goals would be met. The union could unilaterally cut off access to hiring halls and wage costs could fluctuate resulting in inaccurate bids.

Without the enforcement of wage and benefit terms of a prehire agreement, construction industry employees cannot know from one day to the next what they will be paid or to what benefits they are entitled. Section 8(f) allows a union and employer to reach agreement on wage and benefit terms essential to the bargaining relationship. 29 U.S.C. § 158(f) (1976). The congressional policy underlying section 8(f) supports the enforceability of those terms.

B. Iron Workers *supports judicial enforceability of prehire wage and benefit terms.*

The Court, in *NLRB v. Iron Workers*, 434 U.S. 335 (1978), described the prehire contract as " 'a preliminary step that contemplates further action for the development of a full bargaining relationship.' " 434 U.S. at 345 (quoting *Ruttmann Construction Co.*, 191 N.L.R.B. 701, 702 (1971)). The Court noted that "when the union successfully seeks majority support the prehire agreement attains the status of a collective bargaining agreement executed by the employer with a union representing a majority of the employees in the unit." *Id.* at 350.

The singular nature of the construction industry was addressed by Congress: "The occasional nature of the employment relationship makes this industry markedly different from manufacturing and other types of enterprise. An individual employee typically works for many employers and for none of them continuously. Jobs are frequently of short duration, depending upon various states of construction." Sen. Rep. at 27, *reprinted in* 1959 U.S. Code Cong. & Ad. News 2318, 2344, and in Leg. Hist. at 423. Thus, "[r]epresentation elections in a large segment of the industry are not feasible to demonstrate . . . majority status due to the short periods of actual employment by specific employers." 434 U.S. at 349 (quoting Leg. Hist. at 541-42). Accordingly, some consideration should be given to the stability of wage and benefit rights of the employees in the prehire agreement context.

The ability to enter into a voluntary prehire agreement with an employer does not grant the union the privileges of a majority representative. 434 U.S. at 352. A prehire agreement does not attain the status of a collective bargaining agreement subject to 29 U.S.C. § 158(d) (1976) until the union demonstrates majority status. *Id.* at

349-50. Thus, a prehire agreement is something less than a collective bargaining agreement enforceable through the unfair labor procedures. *Id.* A prehire agreement is, however, something more than a nullity; it represents a voluntary contract whereby both parties obtain both the benefits and burdens of the limited relationship created under section 8(f) of the statute.

Iron Workers held that picketing to enforce a prehire contract violates section 8(b)(7). *Id.* at 352. Section 8(b)(7) prohibits picketing to force an employer "to recognize or bargain with a labor organization as the representative of his employees." 29 U.S.C. § 158(b)(7). Concerned with the employees' freedom to choose their bargaining representative, the Court emphasized the voluntary nature of section 8(f) contracts: "Congress was careful to make its intention clear that prehire agreements were to be arrived at voluntarily. . . ." 434 U.S. at 348 n.10. *Iron Workers* does not address the situation where no picketing occurs and the parties voluntarily agree to honor wage and benefit provisions.

Iron Workers prohibits picketing to enforce prehire contracts. *Iron Workers* does not prohibit the enforcement of prehire agreements which were voluntarily agreed upon by the union and the employer. Accordingly, it is appropriate to consider those aspects of the employment relationship which best meet the underlying purposes of section 8(f) and enforce those provisions.

C. *A Section 9 Election Petition Should Not Disrupt Prehire Agreement Wage and Benefit Enforceability.*

Ordinarily, a current collective bargaining agreement acts as a bar to any challenge regarding the majority status of a union. *Pioneer Inn Associates v. NLRB*, 578 F.2d 835 (9th Cir. 1978). Under section 8(f), however, a union's majority status may be called into question at any time: "[A]ny agreement which would be invalid but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title." 29 U.S.C. § 158(f). Section 8(f), however, is limited by its language to permitting a challenge to a union's majority status through the filing of a representation petition with the Board.

A finding that the filing of a section 9 petition renders a prehire contract unenforceable would create a period between election petition filing and NLRB election certification during which the parties to the agreement could not rely on bargained for wage and benefit terms. The effect of this would be that employees would not be assured of agreed upon wages; employers could not rely on access to union hiring

halls; employees would not be assured of medical and other benefit coverage; and employee trusts would not know whether to provide employee benefit coverage. Such a hiatus could create labor instability and jobsite unrest. *See Connell Construction Co. v. Plumbers and Steamfitters*, 421 U.S. 616, 630 (1975).

In *Frank Bros. Co. v. NLRB*, 321 U.S. 702 (1944), the Court upheld a NLRB order requiring an employer to bargain with a union which had lost majority support during a seven-month interval between the union's filing of unfair labor practice charges and the Board's issuance of a complaint based on those charges. The Court refused to allow the employer to disregard its bargaining commitment during the seven-month interval even though the union had lost employee support. The Court noted that:

> [R]efusal of an employer to bargain collectively . . . disrupts the employees' morale, deters their organizational activities, and discourages their membership in unions.
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> . . . .
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> [A] bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed. *Id.* at 704-05.

The Court in *Brooks v. NLRB*, 348 U.S. 96 (1954), held that an employer's belief that his employees had deserted their certified union did not justify the employer's refusal to bargain with the union. As in *Frank Bros.*, the Court found the employer's duty to bargain with the union continued at least until Board review: "If an employer has doubts about his duty to continue bargaining, it is his responsibility to petition the Board for relief, while continuing to bargain in good faith at least until the Board has given some indication that his claim has merit." *Id.* at 103. The Court noted that to allow an employer to refuse to bargain because an employer questions a union's majority status would undercut the "underlying purpose [of] . . . industrial peace." *Id.*

Frank Bros. and *Brooks* support uninterrupted enforceability of prehire wage and benefit provisions. The Court in these cases recognized the importance of stability in labor relations. A prehire contract provides such stability in the construction industry. The filing of a section 9(c) or (e) representation petition requests an election. Enforcement should continue until that election is held.

Should this Court determine that a more definite time period for enforcement of a prehire agreement is desirable, 29 U.S.C. § 158(d)(4) provides an alternative.

Although a Board election is readily available under section 8(f) through the procedures set forth in sections 9(c) and (e), if no election petition is filed, a prehire agreement could be voluntarily enforced by an employer and a minority union indefinitely. *Trust Fund v. McDowell*, 103 LRRM 2219 (1979), illustrates this problem. In *McDowell*, the employer paid benefits to the union trust funds pursuant to the provisions of a minority prehire agreement for almost ten years. *Id.* at 2220. The employer repudiated the agreement and it was held to be unenforceable. *Id.*

Although Congress intended prehire agreements to apply to the short term employment situation in the construction industry, nevertheless, there should be some mechanism that would permit stability if all parties to the agreement (employees, the union, and the employer) so desired, and that would provide a structured termination procedure should any of the affected parties become disenchanted with the provisions of the prehire agreement or representation by the particular signatory union.

Section 158(d)(4) imposes a sixty day notice period to terminate or modify a collective bargaining agreement during which time the agreement "continues in full force and effect." 29 U.S.C. § 158(d)(4). In *Eastern District Council v. Blake Construction Co.*, 457 F. Supp. 825 (E.D. Va. 1978), the district court held that a prehire contract did not terminate until sixty days following notice of intent to terminate. The court reasoned that "[b]orrowing from the notice provision of § 8(d) of the Labor Act, the contract was terminated at the conclusion of the sixtieth day following that date [of termination], through which time damages continued to accrue." *Id.* at 831.

The *Blake* court applied the sixty day notice provision to all collective bargaining agreements, regardless of their method of creation. *Id.* at 829. Under *Blake*, the union's majority status can be raised at any time by the filing of a representation petition under section 9(c) or (e) of the statute. The effect of the election petition would be to start the section 158(d) sixty day time period. The prehire agreement would continue in full force for up to sixty days. The parties to the agreement would be assured of constant wage and benefit enforceability for at least sixty days, during which time an election could be held. Because final decisions on representation petitions are usually made by the Board within sixty days of the petition filing date, a hiatus would likely not occur. 45th Annual Rep. of NLRB for Fiscal Year 1980, page 15, Chart No. 10 (e.g., mean time for final decisions from date of petition in 1980 was thirty-eight days).

The benefit of adopting the sixty day enforcement period under section 158(d) would be to assure employees of wage and benefit provisions called for under the agreement, the union would have the obligation to pursue majority status in a timely fashion for those sites which remain under construction for a sufficiently long time to permit representation proceedings, and the employer would enjoy stable labor costs and continued access to a skilled labor force.

II. COURT ENFORCEMENT OF PREHIRE WAGE AND BENEFIT TERMS IS PROPER.

A. *Section 301 authorizes judicial enforcement of prehire wage and benefit terms.*

Section 301(a) gives federal courts jurisdiction over suits "for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce. . . ." 29 U.S.C. § 185(a) (1978). This Court in *Retail Clerks v. Lion Dry Goods*, 369 U.S. 17 (1962) held that section 8(f) contracts fall within section 301's language.

Since the Court's decision in *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957), it has been settled that section 301 does more than confer jurisdiction: "[I]t authorizes federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements. . . ." *Lincoln Mills* at 451. *Lincoln Mills* instructs the federal courts to fashion enforcement "from the policy of our national labor law." *Id.* at 456. The Court recognized that while the Labor Management Relations Act provides federal courts with some substantive law, not all statutory mandates offer substantive guidance. *Id.* Federal courts can nevertheless provide for enforcement:

> Some [statutory mandates] will lack express statutory sanctions but be solved by looking at the policy of the legislature and fashioning a remedy that will effectuate that policy. *Id.* at 457.
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> . . . .
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> [I]t is far too late in the day to deny that Congress intended the federal courts to enjoy wideranging authority to enforce labor contracts under § 301. *Plumbers & Pipefitters v. Plumbers and Pipefitters, Local 334*, 452 U.S. 615, 627 (1981)

Section 8(f) legislative policy calls for prehire wage and benefit provisions which are binding until NLRB election certification and which are enforceable in the federal courts. *Lions Dry Goods* gives the

courts jurisdiction to resolve section 8(f) disputes. *Lincoln Mills* gives the courts the power to order section 8(f) agreement enforcement.

CONCLUSION

Section 8(f)'s express language only authorizes prehire agreements. Section 8(f) legislative history, however, suggests that Congress passed it with enforceability in mind. Congress left the substance of enforcement to the federal courts.

A prehire agreement is not a complete collective-bargaining agreement; it becomes complete when the union attains majority status. A prehire agreement, however, should have enforceable wage and benefit provisions. All prehire terms may not be enforceable because the prehire contract is a collective bargaining agreement of limited duration, entered into without benefit of union majority status. Yet fairness demands that the agreement should have force. Enforcement of the wage and benefit provisions of a prehire agreement until NLRB election result certification strikes an appropriate balance of interests between the parties and is within the congressional intent behind section 8(f).

Respectfully submitted,

LOYOLA OF LOS ANGELES LAW REVIEW