

IN THE SUPREME COURT OF OHIO

08-0780

SHEET METAL WORKERS'
INTERNATIONAL ASSOCIATION,
LOCAL UNION NO. 33,

Appellee,

v.

GENE'S REFRIGERATION, HEATING
& AIR CONDITIONING, INC.

Appellant.

On Appeal From the Medina County Court
of Appeals, Ninth Appellate District

Court of Appeals
Case No. 06CA0104-M

**MEMORANDUM OF AMICUS CURIAE OHIO READY MIXED CONCRETE ASSOCIATION
IN SUPPORT OF JURISDICTION**

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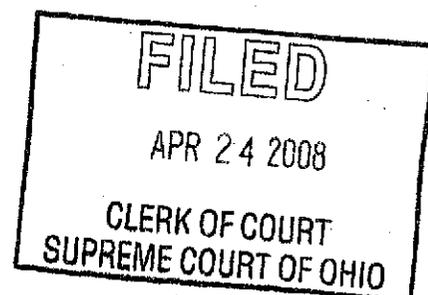


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I

**IDENTIFICATION AND INTEREST OF AMICUS CURIAE
THE OHIO READY MIXED CONCRETE ASSOCIATION**

The Ohio Ready Mixed Concrete Association is a statewide trade association of ready mixed concrete producers. Its members - the vast majority of producers in Ohio - supply approximately 30% of their product for highways, bridges and other public works construction contracts, thus bringing them under the prevailing wage laws if the majority decision of the Court of Appeals is allowed to stand. Like other off-site producers of materials, they have relied for seventy-four years on this Court's ruling in *Clymer v. Zane*¹ that workmen employed off-site in a private enterprise cannot be held to be employees upon a public improvement solely because material prepared in such enterprise is used in the public improvement.

Like all other material suppliers, Ohio's ready mixed concrete producers will be seriously impacted if the decision below is allowed to stand.

II

**WHY THIS CASE IS OF PUBLIC INTEREST AND
WHY THIS CASE IS OF GREAT GENERAL INTEREST**

Article IV, Section 2 of the Ohio Constitution provides that the Supreme Court may review the judgment of a Court of Appeals "In cases of public or great general interest." Few cases more clearly meet these tests.

¹ 128 Ohio St. 359 (1934)

Judge Peck, Chairman of the Convention Committee which drafted the amendment, advised the delegates:

The words "In cases of public or great general interest" have been partially construed, and what the committee means is cases of "public interest" in which the public is interested - state, county or city, some public body - or of "great general interest", cases which involve questions affecting a good many people and that have aroused the general interest.²

The decision of the Court of Appeals has a direct and substantial impact on every school district, township, village, city and county in the state of Ohio as well as upon the state itself. The construction or repair of every public road or building, as well as many ballparks, hospitals, airports and dams, will be impacted. The public interest is manifest.

Every off-site producer of materials that may be incorporated into public works - lumber, steel, aluminum, plumbing, asphalt, the list is limitless - is impacted by this decision. There is great general interest among the thousands of Ohioans involved in public works construction as well as the millions of taxpayers who pay for the labor and materials.³ The people of Ohio do have a great general interest in the cost of constructing public works.

For seventy-four years, since this Court announced its decision in *Clymer v. Zane*, no material supplier on a public works contract has been required to pay prevailing wage. The Legislature has taken no action, and the Department of

² 1 Proceedings and Debates of the Ohio Constitutional Convention (1912-13) 1030.

³ The members of the Court are cognizant of the controversial pending litigation with respect to the awarding of contracts by the Franklin County Commissioners with respect to a new baseball stadium in Columbus.

Commerce has made no effort to enforce the law otherwise. Now, a divided Court of Appeals has reversed the trial court's holding which had followed *Clymer* and has sent shockwaves throughout the construction industry.

It defies reason to believe that the General Assembly reversed *Clymer* in 1935 but for seventy-three years no worker, no labor union, nor any state agency has attempted to enforce the prevailing wage law upon off-site producers of materials used in construction of public roads, bridges, buildings, etc.

Ohio's prevailing wage law has always been known as "A little Davis-Bacon Act." The federal and state laws have generally been read in tandem. The federal law excludes from statutory coverage the employees of material men who sell to a contractor engaged in construction contracts covered by the Act. *H.B. Zachry Company v. The United States*.⁴ Now, the two judges below would send Ohio in a completely different direction by declaring that for seventy-four years the Department of Commerce has failed to enforce the law as the two Judges believe it should have been enforced. We respectfully submit that this is a case of public or great general interest in which the guidance of the Supreme Court is needed lest the law be administered differently in the Ninth Appellate District than it is throughout the rest of the state.

III

STATEMENT OF THE CASE AND FACTS

Appellant, Gene's Refrigeration, Heating & Air Conditioning, Inc. (Gene's) is a construction contractor that performs plumbing, heating, ventilation and air conditioning

⁴ 170 Ct. of Cl. 115; 344 F. 2d. 352 (1965)

work on both public and private construction projects. Gene's also does manufacturing and fabrication of metal duct work at its off-site headquarters. Gene's was awarded a contract to perform certain work at the Granger Fire Station, a public works construction project subject to Ohio's prevailing wage law. Some of the duct work used by Gene's on the Granger project was fabricated at its shop which is not located at the construction site.

One of Gene's employees who helped fabricate the duct work but did no work at the construction site signed a form authorizing the Appellee, Local 33, to represent him in bringing a prevailing wage action in accordance with R.C. 4115.16. No other employee of Gene's signed such a form.

Local 33 brought this action claiming to represent all employees of Gene's who worked on the job-site or who participated in the fabrication of duct work used on the Granger project and claiming they were all entitled to be paid prevailing wages.

The Medina County Court of Common Pleas held that Local 33 did not have authority to represent employees other than the one who had signed the authorization form. The Court further held that the fabricators who did not work on the construction site were not subject to the prevailing wage law. The Court entered summary judgment for Gene's.

On appeal, two judges of the Ninth District Court of Appeals reversed the trial Court holding that Local 33 had standing to represent all of Gene's employees and that the off-site fabrication of materials used in or in connection with a public improvement is subject to Ohio's prevailing wage law. Judge Slaby dissented from the majority opinion.

Amicus Curiae the Ohio Ready Mixed Concrete Association respectfully submits

that the majority of the Court of Appeals erred in their conclusions and upon review by this Court should be reversed.

IV

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: The off-site manufacturing of materials to be Used in or in Connection with a Public Improvement Project is Not Subject to Ohio's Prevailing Wage Law Because the Requirements of Ohio's Prevailing Wage Law Only Applies to Work Performed at and Upon the Jobsite of the Public Improvement Project.

Proposition of Law No. 2: A Labor Organization that Obtains Written a Authorization from an Employee Who has Worked on a Project Subject to the Requirements of Ohio's Prevailing Wage Law Only has Standing as an Interested Party to Pursue Claims Only on Behalf of the Employee who Expressly Authorized the Representation.

This Amicus Curiae adopts and incorporates the arguments set forth in the Appellant's Memorandum in support of the propositions of law. Appellant has accurately stated the arguments and the Court would not benefit from a repetition or restatement by Amicus.

V

CONCLUSION

For the reasons set forth above and for the reasons set forth in Appellant's

Memorandum, Amicus Curiae Ohio Ready Mixed Concrete Association respectfully submits this case is of public interest and of great general interest. It is worthy of review by the Supreme Court, and, upon review, the majority decision of the Court below should be reversed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum of Amicus Curiae Ohio Ready Mixed Concrete Association in Support of Jurisdiction was served by ordinary U.S. Mail, postage prepaid upon Joseph M. D'Angelo, Cosme, D'Angelo & Szollosi Co., L.P.A., The CDS Building, 202 North Erie Street, Toledo, Ohio 43624-1608, Counsel for Appellee, Sheet Metal Workers' International Association, Local Union No. 33 and upon Alan G. Ross and Nick A. Nykulak, Ross, Brittain & Schonberg Co., L.P.A., 6480 Rockside Woods Blvd. South, Suite 350, Cleveland, Ohio 44131-2547, this 24th day of April, 2008.



Attorney for Amicus Curiae