

IN THE SUPREME COURT OF OHIO

Sheet Metal Workers' Int'l Ass'n, Local 33, :  
: :  
Appellee, : Case No. 2008-0780  
: :  
v. : On Appeal from the Medina County,  
: Court of Appeals, Ninth District,  
Gene's Refrig., Heating & Air Cond., Inc., : Case No 06CA0104-M  
: :  
Appellant. :

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AMICUS CURIAE BRIEF OF SMACNA, SMRCA  
IN FAVOR OF APPELLEE'S  
MEMORANDUM CONTRA JURISDICTION

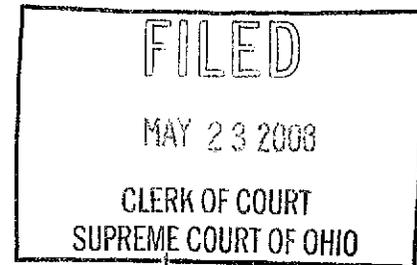
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Table of Contents

	<u>Page</u>
Table of Authorities .....	iii
I. <i>Amicus Curiae</i> .....	1
II. Explanation of Why This Case Fails to Involve an Issue of Public or Great General Interest .....	2
III. Statement of the Case and Facts.....	3
IV. Argument .....	3
<u>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 [sic] to Work Performed at and Upon the Jobsite of the Public Improvement Project.</u> .....	3
<u>Amici’s Response to Proposition of Law No. 1: Ohio’s Prevailing Wage applies to Material Fabrication regardless of where the materials are fabricated.</u> . . . . .	3
<u>Proposition of Law No. 2: A Labor Organization that Obtains Written a [sic] Authorization form 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.</u> .....	5
<u>Amici’s Response to Proposition of Law No. 2: Statutory standing is independent of employee authorization.</u> .....	5
V. Conclusion .....	7
Certificate of Service .....	8

AMICUS CURIAE BRIEF OF SMACNA  
IN FAVOR OF APPELLEE'S  
MEMORANDUM CONTRA JURISDICTION

Table of Authorities

	<u>Page No.</u>
<u>Case Authority:</u>	
<i>Clymer v. Zane</i> (1934), 128 Ohio St. 359; 191 N.E. 123.....	2
<i>Portage Cty. Bd. of Comm'rs v. City of Akron</i> (Portage), 156 Ohio App. 3d 657, 691, 2004 Ohio 1665; 808 N.E.2d 444 .....	6
<i>Sheet Metal Workers' Internatl. Assn., Local Union No. 33 v. Mohawk Mechanical, Inc.</i> (1999), 86 Ohio St.3d 611; 1999 Ohio 209; 716 N.E.2d 198.....	2, 7
<i>State ex rel. Harbarger v. Cuyahoga County Board of Elections</i> (1996), 75 Ohio St.3d 44; 1996 Ohio 254; 661 N.E.2d 699.....	3
<u>Statutory Authority</u>	
R.C. 1.47 .....	3
R.C. 153.14 .....	4
R.C. 4115.03 .....	5
R.C. 4115.05 .....	3

AMICUS CURIAE BRIEF OF SMACNA  
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MEMORANDUM CONTRA JURISDICTION

I. *Amicus Curiae*

Now appear the Sheet Metal and Air Conditioning Contractors' National Association of Cleveland ("SMACNA"), and the Sheet Metal & Roofing Contractors Association of the Miami Valley ("SMRCA"); and pursuant to Rule VI, Section 6, Supreme Court Practice Rules file as *amicus curiae* its brief in favor of Appellee Sheet Metal Workers' International Association, Local Union No. 33, requesting affirmance of the Court of Appeals' decision, and against exercise of discretionary jurisdiction.

SMACNA-Cleveland is a leader of signatory construction employers in the northern Ohio region, promoting professionalism, cost-effectiveness and productivity of construction and service through education, labor relations, public relations, and government affairs. SMACNA members are engaged in the fabrication and erection of architectural sheet metal, commercial, residential, and industrial sheet metal, air conditioning, and other similar businesses. The Association serves as bargaining representative of 65 signatory contractors, and is affiliated with similar local chapters across Ohio and nationwide.

SMRCA-Miami Valley organized for the purpose of encouraging higher standards and ethical practices, and to provide better service to the public in the fabrication and installation of architectural, heating, ventilating and air conditioning

sheet metal and roofing contracting work. The Association serves as bargaining representative of 22 signatory contractors, and is affiliated with similar local chapters across Ohio and nationwide.

II. Explanation of Why This Case Fails to Involve an Issue of Public or Great General Interest

Appellant Gene's Refrigeration argues "great general interest" because the 70-year-old statute is news to Gene. But nothing in the applicable statute has changed since 1935, by Gene's own admission.

Nor did the Court of Appeals change any judicial interpretation of law, finding that both parties relied on the controlling authority of *Sheet Metal Workers' Internatl. Assn., Local Union No. 33 v. Mohawk Mechanical, Inc.* (1999), 86 Ohio St.3d 611; 1999 Ohio 209; 716 N.E.2d 198 ["Neither party cites any other case law which has addressed this issue, and, in fact, this Court has found none." Decision, p. 10].

The Court of Appeals also noted both parties' reliance on *Clymer v. Zane* (1934), 128 Ohio St. 359; 191 N.E. 123, and the subsequent legislative change in statute directly addressing the subject.

The Court of Appeals then determined the case by applying today's facts to the *Mohawk* and *Clymer* decisions and statute, but did not treat this case as first impression of law. Gene's Refrigeration merely invites this Court to revisit *Mohawk* and *Clymer* in application of the facts to existing law.

III. Statement of the Case and Facts

*Amici* adopt Appellee Sheet Metal Workers' International Association, Local Union No. 33's Statement of the Case and Facts.

IV. Argument

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 [sic] to Work Performed at and Upon the Jobsite of the Public Improvement Project.

Amici's Response to Proposition of Law No. 1: Ohio's Prevailing Wage applies to Material Fabrication regardless of where the materials are fabricated.

The subject statute is express, as held by the Court of Appeals, requiring that the "prevailing wage" be paid not just to laborers on the project site in construction, but to laborers fabricating project materials even away from the project site:

R.C. §4115.05: \*\*\* The prevailing rate of wages to be paid for a legal day's work, to laborers, workers, or mechanics, upon any material to be used in or in connection with a public work, shall be not less than the prevailing rate of wages payable for a day's work in the same trade or occupation in the locality within the state where such public work is being performed and where the material in its final or completed form is to be situated, erected, or used. \*\*\* (emphasis added).

The material phrases have no meaning and is surplus if prevailing wage applies only to labor at a project site. Every statute must be interpreted to give it meaning:

R.C. 1.47(B) and (C) ("In enacting a statute, it is presumed that \*\*\* the entire statute is intended to be effective \*\*\* [and a] just and reasonable result is intended[.]").

*State ex rel. Harbarger v. Cuyahoga County Board of Elections* (1996), 75 Ohio St.3d

44; 1996 Ohio 254; 661 N.E.2d 699.

Gene's Refrigeration would have us apply prevailing wage only to labor for labor's sake at the project site, unrelated to labor on materials used at the site. Off-site materials fabrication is common in construction, such as in plumbing, heating, ventilation, and air conditioning. Ignoring off-site work for these trades would be a significant loophole to the prevailing wage concept.

Ohio statute elsewhere treats materials uniquely, separating payment on a public project from site labor:

R.C. 153.14: \*\*\* In addition to all other payments on account of work performed, there shall be allowed by the owner referred to in section 153.01 or 153.12 of the Revised Code and paid to the contractor a sum at the rate of ninety-two per cent of the invoice costs, not to exceed the bid price in a unit price contract, of material delivered on the site of the work, or a railroad station, siding, or other point in the vicinity of the work, or other approved storage site, provided such materials have been inspected and found to meet the specifications. The balance of such invoiced value shall be paid when such material is incorporated into and becomes a part of such building, construction, addition, improvement, alteration, or installation. When an estimate is allowed on account of material delivered on the site of the work or in the vicinity thereof or under the possession and control of the contractor but not yet incorporated therein, such material shall become the property of the owner under the contract, but if such material is stolen, destroyed, or damaged by casualty before being used, the contractor shall be required to replace it at his own expense. \*\*\*

Thus, it should be no surprise to Gene's Refrigeration that materials are constructed for the public sector off-site, and paid for as part of the project when delivered. Gene's Refrigeration has no problem identifying these materials for payment

purposes, invoicing the public agency to pay for off-site fabricated materials when incorporated into the project. But now Gene's Refrigeration insists that they cannot identify the labor on these very items. "[E]mployers would have to keep track of their employees' time in fractional increments, just in case the materials were to be used on a prevailing wage project." Appellant's Memo, p. 5. Yet that is exactly what Gene's Refrigeration does under the public construction statutes.

Proposition of Law No. 2: A Labor Organization that Obtains Written a [sic] Authorization form 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.

Amici's Response to Proposition of Law No. 2: Statutory standing is independent of employee authorization.

Similar to Appellee's status for standing, *Amici* trade associations are "interested parties" for purposes of R.C. 4115.03(F)(4), being, "Any association having as members any of the persons mentioned in division (F)(1) or (2) of this section." *Amici* members are contractors who submit bids, covered in R.C. 4115.03(F)(1). While *Amici* did not appear below as a party, nevertheless they are affected directly by the decision.

Before an Ohio court can consider the merits of a legal claim, the person seeking relief must establish standing to sue. *Ohio Contractors Assn. v. Bicking* (1994), 71 Ohio St. 3d 318, 320, 1994 Ohio 183, 643 N.E.2d 1088. Standing is satisfied when a party has a personal stake in the outcome of the controversy. *State ex rel. Dallman v. Franklin Cty. Court of Common Pleas* (1973), 35 Ohio St.2d 176, 178-79, 298 N.E.2d 515. \* \* \* \*

*Portage Cty. Bd. of Comm'rs v. City of Akron* (Portage), 156 Ohio App. 3d 657, 691,

2004 Ohio 1665; 808 N.E.2d 444.

In reviewing the inclusive parties of R.C. 4115.03(F) for prevailing wage enforcement, the first is any contractor who bid on a public project, whether successful or unsuccessful. A competitive bid is comprised of labor and material costs; if a competitor underbids the labor, then the losing bidder suffered a direct injury.

The second stratum is any subcontractor of a prime bidder.

The third category is any laborer of a bidder or subcontractor.

The fourth party eligible for standing is a trade association of a bidder or subcontractor.

Nothing in the standing statute requires that all four interested parties participate as a condition precedent. If a bidder files suit itself, that bidder fully has standing to pursue enforcement. The bidder's standing does not depend on a trade association also filing suit.

Likewise, if the bidder chooses not to file suit, the trade association has standing to sue by virtue of its member bidding, even if the bidder does not file a complaint on its own. Nothing in the statute requires that the bidder first authorize the trade association. Not even one person's authorization is required.

Today, the employee at issue is in the collective bargaining unit of a bidder. This is sufficient to confer full standing upon the union to litigate enforcement.

In Gene's argument that labor does not have standing but for one person,

Appellant thus admits standing. Once labor has standing, the union is not limited in its rights to participate as a party, nor by only one member's complaint. That member had standing on his or her own, if the only issue is a claim for wages.

The *Mohawk* court generally confirmed the point that the statute does not include any pre-qualification otherwise:

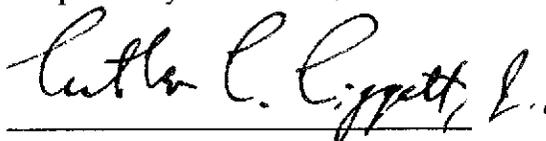
There is not even a hint of a requirement in the statute that the labor organization be a party to a collective bargaining agreement with the employer in question. The statute states that the labor organization must exist, in whole or in part, for the purpose of negotiating with *employers*, not "the employer in question." The statute speaks in a general sense, ensuring that the labor organization in its normal course concerns itself with the stuff of the prevailing wage statute. Bargaining about wages and hours just has to be something that the labor organization normally does. This provision ensures that employees will have their rights defended by an organization with some expertise. *Mohawk* at 614, 201.

There might be confusion on using the word, "authorization" given that the *Mohawk* facts also concerned whether the union had been authorized for collective bargaining. But that has no bearing on today's facts for purposes of standing.

#### V. Conclusion

As this appeal involves no new issues of law, but merely application of facts to existing law, and as Appellee labor union has standing to enforce the statute independently, the discretionary appeal should be rejected.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing

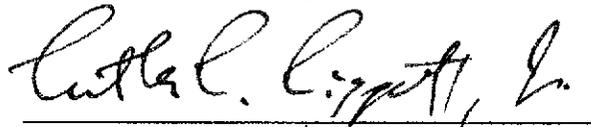
Motion for Leave was sent by hand-delivery, on this 23rd day of May, 2008:

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