

IN THE SUPREME COURT OF OHIO

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

Supreme Court Case No. 08-00780

Court of Appeals
Case No. 06CA0104-M

BRIEF AMICUS CURIAE OF THE
ASSOCIATED GENERAL CONTRACTORS
OF OHIO IN SUPPORT OF
GENE'S REFRIGERATION, HEATING AND AIR CONDITIONING, INC.

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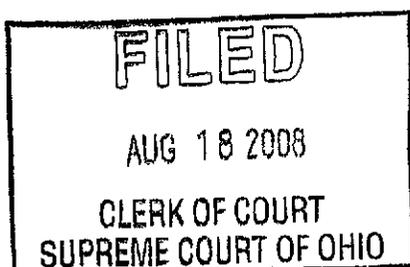


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I. ISSUE PRESENTED FOR REVIEW.

Should the prevailing wage laws of Ohio be expanded to include employers who supply materials from off the site of construction.

II. CONCERN OF THE AMICUS CURIAE.

The Ninth Circuit Court of Appeals judicially amended the Ohio Prevailing Wage Laws based upon the Ohio Legislature's 1935 Amendment to the Prevailing Wage Law. The part of the Amendment at issue states:

The wages to be paid for a legal day's work, to laborers, workmen or mechanics upon any material to be used upon or in connection therewith, shall not be less than the prevailing rate for a day's work in the same trade or occupation in the locality within the state where such public work on, about or in connection with such labor is performed in its final or completed form is to be situated, erected or used and shall be paid in cash.

See § 294, 91 Gen. Assembly Reg. Sess. (Ohio 1935); See also 1935 Ohio Laws 206, 207. The Ninth Circuit opined this "overruled" *Clymer v. Zane* (1934), 128 Ohio St. 359, stating, with it as to Ohio's Prevailing Wage Law:

The statute now expressly provides for the payment of the prevailing rate of wages to employees who *fabricate* materials to be used in or in connection with a public work.

Sheet Metal Workers' Internatl. Assn., Local Union 33 v. Gene's Refrigeration, Heating & Air Conditioning, Inc. (11th Dist. March 10, 2008), 2008 WL 623407, 2008-Ohio-1005, at ¶ 39.

The word "fabricate" is italicized because that word at no point appears in the statutory amendment the Ninth District relies upon. Indeed, just a few paragraphs prior in its opinion the court acknowledged the breadth of its interpretation.

The amended statute expressly addressed the issue of an off-site employee's right to be paid at the prevailing rate. The current version of the statute mirrors the same intent of the legislature to

include off-site employees within the purview of the prevailing wage law.

Sheet Metal Workers' Internatl. Assn., Local Union 33 v. Gene's Refrigeration, Heating & Air Conditioning, Inc., supra, 2008-Ohio-1005, at ¶ 33.

The reason it limits its opinion, and rewrites the amendment, is its obvious concern about the monster it has unleashed.

This judicial amendment to the amendment was perfectly acceptable to the Union. That is the position it was setting out to the Court in its Memorandum in Opposition.

Thus the policy behind the prevailing wage law dictates that hours logged by Gene's employees for fabrication of material used in the Project are compensable at Medina County's prevailing wage rates for sheet metal workers.

(Memorandum of Local Union 33 to the Supreme Court at page 6). But fabrication as to a few pieces of sheet metal is not the impact of the opinion. Entire metal buildings are fabricated outside the project and shipped to a job site where the items for the project are assembled.

This is a major victory for this Plaintiff Union. For years, the National Labor Relations Board and the Courts have struck down attempts by the Sheet Metal Workers Union and other specialty trades to ban any fabricated materials from non-union suppliers as well as union contractors if fabricated at a rate less than that paid at the job site. The reason for this rejection is that the fabrication work has been found not "fairly claimable" by the Sheet Metal Workers Union. Local 33 apparently believes that Gene's, and all others, will have to pay the wage rate determined to be applicable at the work site.

Local 33 is incorrect. Its victory, if it can be called that, is a hollow one indeed. The Ohio Prevailing Wage Law does define the wages to be paid to workers "on the site" of construction are those contained in labor agreements. But, the wage rate that would apply to "off

site” work has no such definition. The same statute defines “on site” work as that contained in labor agreements. It does not so define “off site work.” The statute does not even state the basis to find a separate rate other than in the Country. Indeed, the prevailing rate in Stark County for off site shop work could well be the lower wage rate already paid by Gene’s for its shop work. The attempted end run by Local 33 around the restrictions in the National Labor Relations Act is for naught.

The Decision of the Ninth Circuit is incorrect for a numerosity of other reasons. It ignores the continued interpretation of such laws limited to the construction site. Indeed, the very statute on which it finds standing is limited to employees of contractors and subcontractors at the work site.

The position of AGC, as *amicus*, is that the purpose of the Ohio Prevailing Wage Law is to preserve a “level playing field” between the non union and union contractor at the site of construction. Any wage for off site manufacturers and suppliers is of no relevance to such a purpose. This position is now set out to support the above.

III. THE ASSOCIATED GENERAL CONTRACTORS OF OHIO.

The Associated General Contractors of Ohio (“AGC”) is a statewide association of general and subcontractors as well as those who supply contractors. Its members are part of a series of local chapters throughout the State of Ohio.

The AGC contractor and subcontractor members engage in construction projects for both public and private improvements throughout the State of Ohio. The AGC provides a variety of services to its members – among them being the support of the Ohio prevailing wage law as it involves public construction. The AGC has a vital interest in the overall implications of the decision of the Court of Appeals. The AGC actively participates in the legislative process as to

enactment of statutes, including those involved in prevailing wages. Indeed, it has appeared as *amicus* in cases involving owner rejection of a bidder for prevailing wage violations. AGC appeared on behalf of the owner (*State ex rel. Associated Builders & Contractors of Central Ohio v. Franklin County Board of Commissioners* (10th Dist. June 13, 2008), 2008-Ohio-287). AGC and its local chapter negotiates labor agreements for the site of construction with various building trade unions.

While this case is often labeled with union versus non-union or merit shop overtones, that is not the concern of the AGC in this case. AGC has both union and non-union members. The interest of the AGC lies in the prevailing wage law of Ohio. The purpose of the prevailing wage statute is to provide the “level playing field” for all contractors on public works, union or non-union. Its purpose has never been to require those supplying product to the project to pay a “prevailing rate”, whatever rate that would be found to be.

IV. STATEMENT OF THE CASE.

The factual scenario in this proceeding will be adequately set forth in the other briefs to be filed with this court.

V. LEGAL ARGUMENT OF THE AMICUS AGC.

PROPOSITION OF LAW:

OFF SITE FABRICATION OR MANUFACTURING OF GOODS FOR A PUBLIC IMPROVEMENT PROJECT ARE NOT SUBJECT TO THE REQUIREMENTS OF THE OHIO PREVAILING WAGE LAW.

A. REQUIREMENTS OF OHIO PREVAILING WAGE LAW DO NOT APPLY TO SUPPLIERS OR FABRICATION.

Ohio’s Prevailing Wage Law is set out at Ohio Rev. Code §§ 4115.03 to 4115.16:

Above all else, the primary purpose of the prevailing wage law is to support the integrity of the collective bargaining process by

preventing the undercutting of employee wages in the private construction sector.

State ex rel. Evans v. Moore (1982), 69 Ohio St. 2d 88, 91, 431 N.E. 2d 311.

Ohio's prevailing wage law applies to all construction projects that qualify as "public improvements." See Ohio Rev. Code § 4115.10(A). see also, Ohio Adm. Code 4109:9-4-02(B); *Episcopal Retirement Homes, Inc. v. Ohio Dept. of Indus. Relations* (1991), 61 Ohio St. 3d 366, 369; *Taylor v. Douglas Co.*, 130 Ohio Misc. 2d 4, 2004-Ohio-7348. Pursuant to Ohio Adm. Code 4101:9-4-02(B)(1)(d), in order for there to be a "public improvement" by an institution supported in whole or in part by public funds, there must be: (1) construction and (2) it must be paid for, in whole or in part, from public funds.

In addition to the statute, the Ohio General Assembly provides that the Director "adopt reasonable rules" to facilitate the purpose of the Statute. Ohio Rev. Code § 4115.12 (West 2001). The Director has adopted such regulations. Ohio Adm. Code § 4101:9-4 *et. seq.* The regulations have no provisions for off site work, but only for determining wage rates "on the site of construction" Ohio Adm. Code §4101:9-4-09.

At the construction site, the prevailing rate of wages must be at least as much as that of the same trade or occupation in the location where the work is being performed. Ohio Rev. Code § 4115.05. The statute defines the prevailing wage as the sum of two components: (1) the basic hourly rate of pay and (2) the rate of contributions irrevocably made by the contractor for certain fringe benefits. Ohio Rev. Code § 4115.03(E).

A contractor is required to abide by prevailing wage requirements even if the owner fails to include the requirement in the specifications. *Ohio Asphalt Paving v. Ohio Dept. of Industrial Relations* (1992), 63 Ohio St. 3d 512, 589 N.E. 2d 35, 39. Violations can result in criminal

prosecution. Ohio Rev. Code § 4115.99; *State v. Buckeye Electric* (1984), 12 Ohio St. 3d 252, 466 N.E. 2d 894, 895. One Court of Appeals has even held that the general contractor is responsible for the back pay obligations of its subcontractors. *Cremeans v. Jimco* (10th Dist. June 5, 1986), No. 85AP-821, 1986 WL 6334.

What the approach of the Ninth District ignores is that these requirements are directed toward the contractor and subcontractor, not suppliers or fabricators. The contractor and subcontractor have a series of requirements during the course of the contract, including:

- Contractors required to have its subcontractors to pay prevailing rates.
- Observe apprenticeship requirements under bona fide program (Ohio Rev. Code 4115.05).
- Notify employees of their job classification, rate of pay and identity of the prevailing wage coordinator (Ohio Rev Code 4115.06).
- Contractor or subcontractor to make payments in accordance with the prevailing wage determinations (Ohio Rev. Code 4115.031).
- Construction “on any project” funded by certain other statutory provisions as a public improvement (Ohio Rev. Code 4115.032).
- Contractor or subcontractor to keep full and accurate records, (Ohio Rev. Code 4115.07).
- A prevailing wage coordination to deal with contractors and subcontractors (Ohio Rev. Code 4115.071).

Ohio Rev. Code Section 4115.06 provides:

In all cases where any public authority fixes a prevailing rate of wages under Section 4114.04 of the Revised Code, and the work is done by contract, the contract executed between the public authority and the successful bidder shall contain a provision *requiring the successful bidder and all his subcontractors to pay a rate of wages which shall not be less than the rate of wages so fixed.* The successful bidder and all his subcontractors shall comply strictly with the wage provisions of the contract.

(emphasis supplied). The statute as to “Prohibitions” (Ohio Rev. Code 4115.10), allows an employee “Upon any public improvement” to recover past wages. Ohio Rev. Code 4115.10, references the *contractor* employee and the *subcontractor* employee. The list goes on. In *Gene’s*, the contractor who was on the site was the same for the employer off site. But the provision will not provide an off site employee to file a complaint if a different employer.

In the case of *United Bhd. of Carpenters & Joiners of Am. Local No. 1581 v. Bell Eng. Ltd.* (Ohio App. 6 Dist. April 14, 2006), 2006 WL 988445, 2006-Ohio-1891 the Court performed a legislative analysis, and concluded:

[¶ 24] R.C. 4115.04 clearly states, “every public authority authorized to contract for or construction *with its own forces* a public improvement * * * shall have the director of commerce determine the prevailing rates of wages.” The statutory duty is placed squarely upon the village.

[¶ 23] The legislative intent to limit the applicability of the prevailing wage statutes to those whose forces or employees do actual physical construction and the contracting public authority is further reinforced by review of related statutes.

(emphasis added).

B. THE STATUTE HAS NO MECHANISM TO ESTABLISH A PREVAILING RATE OF WAGES FOR OFF SITE WORK, LET ALONE ENFORCE SUCH A PROVISION.

Even more basic to the incorrectness of the decision is there is no statutory basis to establish a wage rate for off site work, the statute creates no mechanism how such a rate is determined, other than it is to be in the county where the work is to be performed. See “Concern,” *supra* Page 1. The Department of Commerce, in its Regulations, only contains a provision for determining work performed “on the site of construction.” OAC 4101:9-4-09 (“The Director shall determine the prevailing rate of wages to be paid for a legal day’s work to employees upon such public works . . .”). Cf. Op. Attorney. Gen. No. 77-076 (Since there was

no collective bargaining agreement that defines the rates of such technicians, there was no prevailing rate to certify).

C. THE JUDICIAL AMENDMENT TO THE STATUTORY AMENDMENT.

The overwhelming complexity that would be caused by the requirement all wages paid for materials incorporated into the project was conceded by the Ninth District.

Recognizing the problem, the Ninth district rewrote the statute by stating:

The statute, however, includes a presupposition that the materials at issue must be fabricated specifically “to be used” in regard to the project, rather than pre-fabricated materials made in the ordinary course by suppliers.

Sheet Metal Wkrs., *supra*, ¶ 37. The Court went on to “surmise” (its wording):

[i]t would not be difficult to trace materials made specifically for a particular public improvement to determine which off-site workers would be subject to the prevailing wage law.

Id. The Court should have read further on in the statute. Immediately following the statutory provision concerning such rate as to “material to be used upon or in connection therewith,” is the next paragraph of 4115.03:

Every contract for public work shall contain a provision that each laborer, worker or mechanic, employed by such contractor, subcontractor, other person *about or upon such public work*, shall be paid the prevailing rate of wages provided in this section.

(Emphasis added). The phrase “about or upon” designates, at a minimum, proximity to the site.

The Court proceeded to amend the statute to read it in a way it sees fit.

The Ninth Circuit does from time to time push the borders of existing law to no doubt respond to what it considers an inviting set of facts. It fashioned a damage remedy for a competitive bidding dispute in *Cementech v. City of Fairlawn* (2006), 109 Ohio St. 3d 475, 849

N.E. 2d 24, in conflict with other Appellate tribunals and which was recently reversed by this Court. As this Court stated:

In this case, the appellate court justified its decision to award the appellee lost profits by finding that precluding damages would “allow government entities to go unpunished for ignoring Ohio and municipal laws.” *Cementech, Inc.*, 160 Ohio App. 3d 450, 2005-Ohio-1709, 827 N.E. 2d 819, ¶ 17. However, punishing government entities through lost-profit damages to rejected bidders in effect punishes the very persons competitive bidding is intended to protect – the taxpayers.

D. LABOR AGREEMENTS FOR THE SITE OF CONSTRUCTION ARE INAPPLICABLE TO WORK OFF THE CONSTRUCTION SITE.

The National Labor Relations Act has two major statutory restrictions concerning the site of construction. This Court has had occasion to recognize the relationship between the Ohio Prevailing Wage Laws and Federal Labor Laws in *Pipe Fitters Union Local No. 392 v. Kokosing Construction Company, Inc.* (1998), 81 Ohio St. 3d 214, 690 N.E. 2d 515:

We are not required to ignore the fact that the National Labor Relations Act exists when interpreting Ohio prevailing wage law, irrespective of the doctrine of federal preemption. This court believe[s] in and endeavor[s] to fastidiously adhere to, the principles of federal-state judicial comity. *State ex. rel. Natl. City Bank v. Cleveland City School Dist. Bd. of Edn.* (1977), 52 Ohio St. 2d 81, 87, 6 O.O. 3d 288, 291, 369 N.E. 2d 1200, 1204. Moreover, comity is a proper consideration in statutory interpretation. *Reich v. Great Lakes Indian Fish & Wildlife Comm.* (C.A.7, 1993), 4 F. 3d 490, 495. Recognition of Congressional intent that the NLRA provide the governing law in resolving labor disputes, and more particularly, over work-jurisdiction disputes, may influence our own interpretation of state prevailing wage law even if our authority to determine prevailing wage claims is not preempted by federal law.

One such provision is Section 8(e) of the National Labor Relations Act 29 U.S.C. 186 (c). That Section precludes certain subcontracting. However, it also contains the rule known as the Construction Industry Proviso which relates to subcontracting of work and restrictions on pay

rates to the project site rate. The union restrictions on subcontracting to others will be upheld if the clause is for “work preservation,” that is, aimed to preserve work historically performed by the Union. The Labor Board will permit restrictions only as to work traditionally performed by the bargaining unit employees, where it is a primary work jurisdiction clause. *National Woodwork Mfrs. Assn. v. NLRB* (1967), 386 U.S. 612. Certain trade unions, such as the Sheet Metal Workers, have attempted to require that off site fabrication be paid at the higher project rate. The Labor Board has voided these restrictions on off site fabrication because such work is not historically performed as “fairly claimable.” The following clause was struck down as unenforceable in *Sheet Metal Workers Local 141 (Cincinnati Sheet Metal & Roofing)* (1969), 174 NLRB No. 125, 74 LRRM 1324:

Article II Section 2. Subject to other applicable provisions of this Agreement, the Employer agrees that when subcontracting for prefabrication of material covered herein, such prefabrication shall be subcontracted to fabricators who pay their employees engaged in such fabrication not less than the prevailing wage for comparable sheet metal fabrication, as established under provisions of this Agreement.

What Local 33 would succeed in doing is what has been found illegal elsewhere. It believes it can amend the “fabrication” rate to be paid at the “construction” rate.

The Board has found that the mixing, delivery, and pouring of ready-mix concrete, the delivery of precast concrete pipe, the transportation of tools, materials, and personnel to and from a construction site, the delivery of sand fill, and the haulage of waste are not jobsite work. *Teamsters Local 294 (Island Dock Lumber 1963)*, 145 NLRB 484 enf’d, 351 F.2d 547 (D.C. Cir. 1966).

To attempt to construe the Amendment to preserve the off site rate the construction site would be to run afoul of another provision of the National Labor Relations Act. That is Section 8(f) of the Act. 29 U.S.C. 158(f). It authorizes the use of “pre-hire agreements”, and creates an exception to the rule not permitting negotiation to the union without a showing of majority support. *Nova Plumbing Inc. v. NLRB* (D.C. Cir. 2003), 330 F. 3d 531, 533. This statutory section permits requiring new employees to join the union in eight days, not thirty as set out in other agreements.

In construing §8(f), the National Labor Relations Board has distinguished on-site construction contractors from off-site manufacturers, materialmen and suppliers. Even though these off-site employers may occasionally be involved in delivering or installing their products at construction sites, they are engaged in manufacturing or sales, rather than construction. Manufacturing operations are not found to be within the building and construction industry for purposes of §8(f), even where the manufactured products are delivered to a construction site and some on-site work is performed by covered employees. *See, e.g. Frick Co.*, (1963) 141 NLRB 1204, where the Board concluded that a manufacturer of refrigeration equipment could not enter into a §8(f) pre-hire agreement with the plumbers union, covering the on-site installation of such equipment attendant to an ongoing construction project involving a meat-packing plant; notwithstanding this occasional installation work. The Board found that the employer was primarily a manufacturer, rather than being engaged primarily in the construction industry.

The Labor Board reached similar conclusions in cases involving a manufacturer of steel pipes, even though the pipes might be installed at construction sites (by employees of other employers), *W.L. Rives Co* (1962), 136 NLRB 1050 (1962), *enfd sub nom* (5th Cir. 1953), *NLRB v. W.L. Rives Co.*, 328 F. 2d 464; and a manufacturer of pre-cast concrete structures which were

custom-designed for installation into construction projects (although the on-site installation work was performed by employees of other employers), *Forest City/Dillon-Tecon Pacific* (1974), 209 NLRB 867, enf'd sub nom *NLRB v. Forest City/Dillon-Tecon Pacific* (9th Cir. 1975), 522 F. 2d 1107. *See also*, *Animated Displays Co.* (1962), 137 NLRB 999, involving a manufacturer of display cases, which were assembled almost exclusively in its plant (95% of the work), albeit with a small portion (5%) being fabricated on job sites, leading the Board to conclude that the employer was not primarily engaged in the building and construction industry for purposes of §8(f).

Following the admonitions of this Court in *Pipefitting Local 372*, *supra*. The rates of wages for off site work cannot be premised upon on site construction rates.

E. THE DECISION OF THE COURT IN *CLYMER V. ZANE* FORMED NO BASIS TO EXTEND THE OHIO PREVAILING WAGE LAW TO ALL MATERIALS MANUFACTURED FOR THE SITE.

The *Clymer* case (*Clymer v. Zane* (1934), 129 Ohio St. 359, 191 N.E. 123) involved a contractor's employees who worked in an off-site gravel pit, and employed by the Contractor, to provide sand and gravel for concrete to be used in a public improvement project. The issue before the Supreme Court was whether "the men who worked in the gravel pit [were] employees upon a public improvement" (Emphasis in original). The Court held:

A private enterprise, separate in time and in space, is not necessarily a part of a public improvement because owned and operated by the contractor in charge of the public improvement, and workmen employed in such 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.

This Court reasoned:

To extend the provisions of the statute to all employees who prepare material for a public improvement would be to include within the provisions of the law the employees of a cement factory which makes cement for a public improvement, and the employees of a brick plant which makes paving brick for a public highway, if such cement plant or brick factory is owned or operated by the contractor in charge of the public improvement. Such a construction would likely to lead to conflicts with regulations and 'codes' governing wages of other industries.

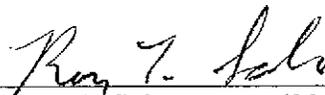
While the "rationale" for the decision included all materials furnishes, the case was narrow in its application: a gravel pit.

The Ninth District Court in *Gene* limits its opinions to materials fabricated for the work site. That was not even the issue in *Clymer*. Its statement that the Amendment to the prevailing wage law applies to work "fabricated" for the site is non-supportable.

V. **CONCLUSION**

For the foregoing reasons, *Amicus Curiae* AGC requests that the Court reverse the decision of the Ninth District.

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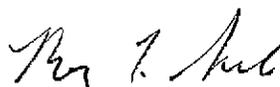
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Brief, *Amicus Curiae*, of the Associated General Contractors of Ohio was served by U.S. Mail on this 15th day of August, 2008 upon the following:

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