No. 07-1832

IN THE

United States Court of Appeals

FOR THE FIRST CIRCUIT

AMERICAN STEEL ERECTORS, INC., AJAX CONSTRUCTION CO., AMERICAN AERIAL SERVICES, INC., BEDFORD IRONWORKS, INC., AND D.F.M., INDUSTRIES, INC.,

Plaintiffs-Appellants,

v.

LOCAL UNION NO. 7, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL & REINFORCING IRON WORKERS,

Defendant-Appellee.

On Appeal from a Decision and Order of the
United States District Court for the District of Massachusetts

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BRIEF FOR AMICUS CURIAE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC. IN SUPPORT OF PLAINTIFF-APPELLANT FOR REVERSAL OF DECISION OF DISTRICT COURT

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IDENTITY AND INTEREST OF THE *AMICUS* AND SOURCE OF AUTHORITY TO FILE

The National Right to Work Legal Defense Foundation, Inc. ("Foundation") is a nonprofit, charitable organization that provides free legal assistance to individual employees who, as a consequence of compulsory unionism, have suffered violations of their right to work; their freedoms of association, speech, and religion; their rights to due process of law; and other fundamental liberties and rights guaranteed by the Constitution and laws of the United States and of the several States.

The Foundation has represented numerous individuals before the courts in such landmark cases as *Davenport v. Washington Education Ass'n*, 127 S.Ct. 2372 (2007); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991); *Communications Workers of America v. Beck*, 487 U.S. 735 (1988); *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986); *Minnesota State Board v. Knight*, 465 U.S. 271 (1984); *Ellis v. Railway Clerks*, 466 U.S. 435 (1984); and *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).

The Foundation is concerned with the injustice of penalizing workers who have exercised their right to refrain from any union activity and have chosen to work for a non-union contractor. The employees who work for non-union

contractors are impacted by a union job targeting program that provides subsidies to union contractors in the bidding process. The Foundation is also concerned about the employees of union employers whose compulsory union fee payments are spent to subsidize employers. The Foundation has a specific interest in the issue of the use of union dues and compulsory fees deducted from wages which are used for job targeting programs. *See Can-Am Plumbing*, 350 N.L.R.B. No. 75 (Aug. 24, 2007) (Foundation filed an *amicus* in that case).

The National Right to Work Legal Defense Foundation supports the Plaintiffs/Appellants. Consistent with the Foundation's long standing support of individual employee rights, the Foundation argues below that taking employees' wages earned on Davis-Bacon projects to fund a job targeting program is an unlawful deduction that does not bear a reasonable relationship to a legitimate union interest. The use of union dues and compulsory fees to subsidize favored employers is both unlawful and contrary to public policy. Therefore, the "legitimate" union-interest exemption for labor unions from anti-trust laws does not apply.

The issue presented is of great interest not only to employers but to employees. Workers who are forced to pay dues to a union risk having their money taken, and those who work for a non-union employer risk losing their jobs,

when their employer is out-bid by a competitor subsidized by job targeting funds. While the Foundation argues in support of the Plaintiffs-Appellants employers, it has the unique role of advocating the interests of neither employers nor unions but rather the employees whose money is deducted for job targeting programs or who work for non-union employers.

The source of authority to file this motion is the accompanying motion for leave to file.

ARGUMENT

I. Introduction

This case alleges that a labor union, Local 7, International Association of Bridge, Structural, Ornamental & Reinforcing Iron Workers ("Local 7" or "Union") violated anti-trust laws. While unions generally are exempt from anti-trust actions, unions do not have a blanket exemption. *See* e.g., *Allen Bradley Co. v. Local Union No. 3, IBEW,* 325 U.S. 797 (1945) (union violated anti-trust laws).

A union is only exempt from anti-trust action if it both "acts in its own self interest and does not combine with non-labor groups," *United States v. Hutchenson*, 312 U.S. 219, 232 (1941). In this case, the district court held that Local 7 was exempt under the anti-trust laws. However, Defendant-Appellee

Local 7 has failed to satisfy either prong of the *Hutchenson* test. *Amicus* National Right to Work Legal Defense Foundation will focus on the first prong of the test. It will not discuss the second prong of the test; that the Defendant-Appellee Local 7 combined with non-labor group.[1]

A union can be exempt from anti-trust laws only if its actions serve its own self interest. In order to serve its self interest, it must be a *legitimate* union interest. *Allied Int'l Inc. v. Int'l Longshoremen's Ass'n*, 640 F.2d 1368,1380 (1st Cir. 1981), *aff'd*, 456 U.S. 212 (1982) (a union's self interest "bear[s] a reasonable relationship to a *legitimate* union interest") (emphasis added). Job targeting or market recovery funds (hereinafter collectively referred to as "Job Targeting Programs" or "JTP"), involve labor unions deducting money from the wages of members and compulsory fee payors to raise funds to subsidize union contractors in order to make them more competitive when bidding against non-signator employers. As discussed below, the JTP schemes violate the law and are inimical to public policy. Therefore, they do not serve a legitimate union interest.

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[1]A good description of how employers are intimately intertwined with unions in Job Targeting Programs is set-forth in *Electrical Workers Local 357 v. Brock*, 68 F.3d 1194 (9th Cir. 1995).

II. The Collecting and Uses of Job Targeting Funds Do Not Serve A Legitimate Union Interest and Thus, Unions Collecting and Using Such Funds Are not From Anti-Trust Laws.

A. The Use of Job Target Funds Derived, at Least in Part, from Davis-Bacon Wages Is Unlawful.

JTP funds are often deducted from the wages employees earn on Davis-Bacon work projects. 40 U.S. C. § 276a *et seq*. The Davis-Bacon Act is a minimum wage statute for construction workers on government projects. *United States v. Binghamton Constr. Co.*, 347 U.S. 171, 177- 78, (1954). The Davis-Bacon Act requires that wages must be paid "unconditionally . . and without subsequent deduction or rebate on any account, the full amounts accrued at the time of payment . . . regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and such laborers and mechanics," 40 U.S.C. § 276a(a).[2]

Deducting JTP funds from Davis-Bacon wages is clearly unlawful. That has been recognized by the Wages Appeal Board of the U.S. Department of Labor, the National Labor Relations Board, and the courts.

In 1991, the Wages Appeal Board, held that employers deducting money

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[2]Similarly, the deduction of dues and fees are torts under state law and are not pre-empted by the National Labor Relations Act. State prevailing wage laws are minimum wage laws and, as such, are not pre-empted. *Dillingham Constr. v. County of Sonoma*, 190 F.3d 1034, 1039 (9th Cir. 1999).

from the wages of employees working on Davis-Bacon projects and using those funds for JTP violate the Davis-Bacon Act. *In re Bldg. & Constr. Trades Unions Job Targeting Programs*, 1991 WL 494718 (WAB June 13, 1991). The Wage Appeal Board's decision was upheld by the U.S. Court of Appeals for the District of Columbia in *Building & Construction Trades Department v. Reich*, 40 F.3d 1275 (D.C. Cir. 1994).

The U.S. Court of Appeals for the Ninth Circuit, in agreement with the D.C. Circuit, held that a labor union could not sue to collect money for JTP, since compelling payments for JTP violates the Davis-Bacon Act. *Elec. Workers Local 357 v. Brock*, 68 F.3d 1194 (9th Cir. 1995). As the court in *Brock* stated, "the local union serves as an intermediary that impermissibly effectuates the reduction of employee's wages for work performed on government projects to the benefit of contractors," *id.* at 1200.

The National Labor Relations Board also has held that money taken from Davis-Bacon wages for JTP are unlawful. In *Kingston Constructors, Inc.*, 332 N.L.R.B. 1492 (2000), the Board found that it was an unfair labor practice for a union to take money from wages earned on Davis-Bacon projects for JTP. The Board found that the use of money taken from the dues of non-Davis-Bacon wages was lawful *but* that the taking of money from wages earned on Davis-Bacon

projects was unlawful and inimical to public policy. *Id.* at 1500.

Local 7 and the employers who accepted JTP funds taken from Davis-Bacon wages were clearly on notice from the above-discussed Wage and Appeal Board decision, the First and Ninth Circuit Courts of Appeals cases, and the National Labor Relations Board case, that their scheme was unlawful. Therefore, the Union's JTP did not bear a reasonable relationship to a *legitimate* union interest and was not exempt from anti-trust laws.

B. The Use of Any Dues or Compulsory Fees for JTP Is Unlawful and Inimical to Public Policy.

As discussed above, all of the agencies and courts that have examined the issue of the collection and use of JTP funds from Davis-Bacon projects have concluded that this conduct is unlawful. The collection and use of JTP funds on non-Davis-Bacon projects is also unlawful. The collection and use of JTP funds is unlawful and inimical to public policy for a number of reasons. First, it results in the reduction in wages of employees, and thus does not serve the employees for whom the laws are intended to protect. It creates the untenable situation where employees are in essence paying employers for the opportunity to work.

JTPs are also inimical to public policy because a labor union paying money to an employer is nothing short of a bribe to deal with the union. It clearly is meant to encourage employers to recognize, bargain with, and enter into

compulsory unionism agreements with the union. As a reward, the employer is subsidized by the union. If such conduct is permitted, it will create the "company unions" that Congress sought to prohibit. *See,* 29 U.S.C. 158(a)(2).

The courts have defined union "membership," which may be required, as "whittled down to its financial core." *NLRB v. General Motors Corp.*, 373 U.S. 734, 742 (1963). The financial core is the payment of dues and fees for collective bargaining activities. The compulsory taking of money from employees for non-collective bargaining activities is unlawful, *CWA v. Beck*, 487 U.S. 735 (1988). Clearly JTP programs are not related to collective bargaining. Therefore, the compulsory collection of money for JTP programs is unlawful, whether or not the funds are from Davis-Bacon wages.

In addition, when a union makes separate deductions for JTP funds from non-Davis-Bacon projects, the deductions are no longer uniform periodic dues. They are a special assessment. The Wage Appeals Board held, as did the U.S. Supreme Court in *Beck,* that "periodic dues" under Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. §158(a)(3) are limited to those necessary for a union to act in its role as a collective bargaining agent. *In re Bldg. & Constr. Trades Unions Job Targeting Programs*, 1991 WL 494718 (WAB June 13, 1991). The U.S. Court of Appeals for the District of Columbia cited *Beck* for the

proposition that JPT deductions do not qualify as periodic dues. *Bldg. & Constr. Trades Dep., v. Reich*, 40 F.3d 1275, 1282 (D.C. Cir. 1994). Since money collected for JPT is not uniform periodic dues, the forcible collection of any such funds is inimical to public policy.

III. Conclusion

JTPs schemes are unlawful and inimical to public policy and, therefore, are not a *legitimate* union interest. Since JTPs schemes are not a legitimate union interest, the Defendant-Appellee Local 7 is not exempt from the anti-trust laws. The court below erred in finding that Local 7 was exempt under the anti-trust laws and the court's decision should be reversed.

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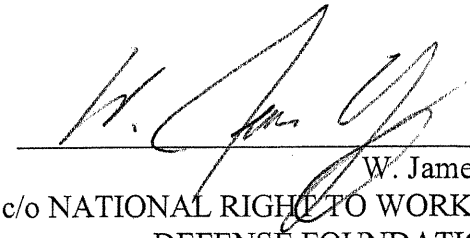
CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(c), the undersigned certifies that this brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B)(I).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. Proc. 32(a)(7)(B)(iii) and by Order of this Court, this brief includes 630 words.

2. This Brief has been prepared in proportionally spaced typeface WordPerfect 12 in 14 point Times New Roman font for text. As permitted by Fed. R. App. Proc. 32(a)(7)(C), the undersigned has relied upon the word count of this word-processing system in preparing this certificate.



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CERTIFICATE OF SERVICE

I hereby certify that three copies of the *NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION'S AMICUS CURIAE BRIEF* were served on the following individuals by United States Mail, postage prepaid, on this the 14th day of September 2007:

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