1-9-2023

When Does the National Labor Relations Act Preempt a State Tort Claim for Property Damage Arising from Workers' Alleged Failure to Take Precautions to Protect Employer Property before Going on Strike?

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Custom Citation

Anne Marie Lofaso, *When Does the National Labor Relations Act Preempt a State Tort Claim for Property Damage Arising from Workers' Alleged Failure to Take Precautions to Protect Employer Property before Going on Strike?*, 50 Preview U.S. Sup. Ct. Cas. 35 (2022).

LABOR LAW

When Does the National Labor Relations Act Preempt a State Tort Claim for Property Damage Arising from Workers' Alleged Failure to Take Precautions to Protect Employer Property before Going on Strike?

CASE AT A GLANCE

Glacier Northwest's unionized ready-mix concrete truck drivers went on strike after the parties had reached an impasse and their collective bargaining agreement had expired. Several strikers returned their trucks fully loaded, rendering the concrete useless, although the trucks were not damaged. This case presents a question whether the drivers' strike, which is regulated by federal law, subjects their union to a state law tort claim for damage to the concrete.

Glacier Northwest, Inc. v. International Brotherhood of Teamsters Local Union No. 174
Docket No. 21-1449

Argument Date: **January 10, 2023** From: **The Supreme Court of Washington**

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Introduction

In 1935, Congress enacted the National Labor Relations Act (NLRA), "declar[ing]" it to be the "policy of the United States" to "protect[] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing." 29 U.S.C. § 151. To ensure those freedoms and to redress the "inequality of bargaining power" as between employers and employees, NLRA Section 7 granted workers "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. Those Section 7 rights, concluded the Supreme Court, are "fundamental." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

To protect Section 7 rights, including the right to strike, Congress imposed duties on employers and on unions. The most basic of those duties are currently codified in NLRA Sections 8(a)(1) and 8(b)(1)(A). Section 8(a)(1) prohibits employers from "interfer[ing] with, restrain[ing], or coerc[ing] employees in the exercise of [their Section 7] rights." 29 U.S.C. § 158(a)(1). Section 8(b)(1)(A) likewise prohibits unions from "restrain[ing] or coerc[ing] employees in the exercise of [those] rights." 29 U.S.C. § 158(b)(1)(A).

The right to "strike"—defined as any "concerted stoppage of work by employees" and "any concerted slowdown or other concerted interruption of operations by employees," 29 U.S.C. § 142(2)—is protected not only under Section 7 but also under Section 13: "Nothing in this Act [subchapter], except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike or to affect the limitations or qualifications on that right." 29 U.S.C. § 163; *see NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963).

Federal labor law also regulates the right to strike in a carefully balanced statutory network. Relevant here, Section 8(d) regulates the timing of strikes. In particular, as part of its duty to bargain, where a union, which is party to a collective bargaining agreement with an employer, intends to modify or terminate that contract, it must notify the employer, the Federal Mediation and Conciliation Service, and the relevant state mediation agency of that intent and accordingly the possibility of a strike at least 60 days before striking. 29 U.S.C. § 158(d). Moreover, Congress created and tasked the National Labor Relations Board (NLRB or Board) to, among other things, investigate violations and enforce the NLRA's provisions. 29 U.S.C. §§ 153–156. The Supreme Court has repeatedly held that the Board has primary jurisdiction over NLRA violations. *See, e.g.*, *Brown v. Hotel and Restaurant Employees and Bartenders International Union Local 54*, 468 U.S. 491 (1984); *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180 (1978); *San Diego Building Trades Council, Millmen's Union, Local 2020 v. Garmon*, 359 U.S. 236 (1959).

This case presents a question of federal preemption. NLRA preemption serves to protect the Board's authority to adjudicate unfair-labor-practice charges and provide for the NLRA's uniform interpretation and implementation. *Garmon* preemption, which is at issue here, cordons the Board's primary jurisdiction to implement a uniform national labor policy under the NLRA by prohibiting the states from regulating conduct that is Section 7 protected (or arguably protected) or Section 8 prohibited (or arguably prohibited). *See San Diego Building Trades Council, Millmen's Union, Local 2020 v. Garmon*, 359 U.S. 236 (1959); *see also Sears. Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180 (1978). If the conduct in question even arguably falls within the NLRA's scope, then state and federal courts must defer to the Board's "exclusive" jurisdiction to avoid "the danger of state interference with national policy."

Where the Board has not yet decided a case, those claiming that the NLRA preempts a state cause of action bear the burden of showing only that Section 7 "arguably" protects such conduct; that party must "advance an interpretation of the Act that is not plainly contrary to its language and that has not been 'authoritatively rejected' by the courts or the Board." *Longshoremen v. Davis*, 476 U.S. 380 (1986) (citation omitted). The party must then posit "enough evidence to enable interpretation of the [NLRA] that is not plainly contrary to its language and that has not been 'authoritatively rejected' by the courts or the Board" and show that "the Board reasonably could uphold a claim based on such an interpretation." If that burden is borne, then "the jurisdiction of a state court will be ousted."

Even if a state claim is technically *Garmon* preempted, a state court may resolve it if the party raising the state claim lacks a "reasonable opportunity" to secure a Board decision. For example, if the employer with the state law claim has no basis to file an unfair-labor-practice charge and the union refuses to do so, then the state case is permitted to proceed, and the state court would resolve the federal question. *See Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*.

This case raises the question whether a state court may act on a tort claim arising from a strike that Section 7 arguably protects when the question of whether Section 7 protects the strike is before the NLRB.

Issue

When a case is pending before the NLRB and a state court, which tribunal should decide whether an otherwise Section 7–protected strike loses its protection because the strikers did not take reasonable steps to avoid foreseeable damage to property caused by the sudden work cessation?

Facts

Petitioner Glacier Northwest, Inc., d/b/a CalPortland (Glacier), sells and delivers ready-mix concrete to customers in Washington State. Employees mix each batch of concrete to customer specification, load the batch onto a truck's mixing drum, and then deliver it to the customer. Once mixed, the concrete must be delivered, poured, and finished that day, or the concrete becomes useless. Once at rest, the concrete immediately begins to harden. Moreover, if the concrete remains in the truck's mixing drum for a prolonged period of time, it could harden and damage the truck.

Respondent, International Brotherhood of Teamsters Local Union No. 174 (Union), is a labor union that represents Glacier's drivers. The parties' collective bargaining agreement, including its no-strike clause, expired on July 31, 2017, while the parties were negotiating a successor agreement. The parties reached an impasse, and the Union called a strike, instructing the drivers to keep their trucks running and the drums rotating. On the morning of August 11, approximately 85 drivers went on strike. Glacier alleges that between 7:00 and 7:45 a.m. 16 drivers returned with fully loaded trucks; Glacier

disciplined those drivers. Over the following five hours, Glacier's nonstriking workers and managers unloaded and cleaned the trucks, none of which were damaged.

On December 4, 2017, Glacier filed a tort action in Washington Superior Court for damages allegedly resulting from the strike. Thereafter, based on previously filed charges, the Board issued a complaint, alleging, among other things, that Glacier violated NLRA §§ 8(a)(1) and 8(a)(3), 29 U.S.C. §§ 158(a)(1) and 158(a)(3), by retaliating against Union drivers for engaging in a protected strike. In 2018, the state court granted, in relevant part, the Union's motion to dismiss on the pleadings because Section 7 at least "arguably protected" the drivers' striking conduct, and therefore the state-tort claims for property damage flowing from that conduct were *Garmon* preempted. Interpreting the Board's precedent, the Washington Court of Appeals reversed the superior court's decision, in relevant part, on grounds that the NLRA does not even arguably protect "the intentional destruction of property during a lawful work stoppage." Citing court-enforced Board precedent, the state intermediate appeals court added that "workers who fail to take reasonable precautions to prevent the destruction of an employer's plant, equipment, or products before engaging in a work stoppage may be disciplined by an employer for this conduct." *See Glacier N.W., Inc. v. Int'l Bhd. of Teamsters Local Union. No. 174*, 475 P.3d 1025 (Wash. App. Div. 2020) (citing *Marshall Car Wheel & Foundry Co. of Marshall, Texas, Inc.*, 107 N.L.R.B. 314 (1953), *enforced*, *NLRB v. Marshall Car Wheel & Foundry Co. of Marshall, Texas, Inc.*, 218 F.2d 409 (5th Cir. 1955)).

The Washington Supreme Court granted discretionary review and reversed. Acknowledging Board precedent that "employees must take reasonable precautions to protect an employer's plant, property, and products," the state court observed that, on a "full factual analysis," the Board might conclude that the strike was "protected because the concrete loss was incidental damage given the perishable nature of the concrete" or that it might conclude that the strike was not protected at least with regard to those drivers who returned their trucks with concrete and who failed to take reasonable precautions to protect the trucks and concrete. *Glacier N.W., Inc. v. Int'l Bhd. of Teamsters Local Union No. 174*, 500 P.3d 119 (Wash. 2021). The court concluded that Glacier's claims were therefore *Garmon* preempted because this "fact-specific determination"—whether the union took reasonable precautions—should be made by the Board "in the interest of the uniform development of labor policy," and not a state court. The court also concluded that *Garmon*'s local-interest exception applied only to "violent or outrageous conduct," which was not at issue here.

The Supreme Court granted Glacier's petitioner for *certiorari*.

Case Analysis

It is undisputed that Section 7 protects strikes as concerted activity. *See Bus Employees v. Wisconsin Employment Relations Board*, 340 U.S. 383 (1951). It is also undisputed that concerted activity can lose its protection. *See NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962) (explaining that Section 7 does not protect concerted conduct that is unlawful, violent, in breach of contract, or indefensibly disloyal). For example, the NLRA does not protect mutiny in protest of working conditions. *See Southern S.S. Co. v. NLRB*, 316 U.S. 31 (1942). Nor does Section 7 protect violent conduct committed during a strike. *See NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939). Section 7 also does not protect an otherwise lawful strike committed in breach of a no-strike promise in a collective bargaining agreement. *See NLRB v. Sands Mfg. Co.*, 306 U.S. 332 (1939) (breach of collective bargaining agreement resulting in unprotected strike). All parties agree that if the drivers' strike did not lose its statutory protection when some of the drivers returned fully loaded trucks, then the Washington state court cannot impose damages for the lost concrete. All parties also agree that if Section 7 does not protect the strike, then a Washington state court can decide whether the drivers' conduct constituted a tort under state law and whether damages should be assessed for the lost concrete. Accordingly, the question now is which tribunal should decide the question whether Section 7 protects the drivers' strike.

The two parties, their supporting amici, and the government each present a different view of the case. Glacier and amici contend that there are no circumstances under which Section 7 protects the conduct in this case because the strikers intentionally destroyed Glacier's property. Accordingly, the Supreme Court should reverse the Washington Supreme Court and remand the case to state court to assess damages. In contrast, the Union and amici contend that the conduct at issue is clearly "arguably protected," as evidenced by the fact that the Board's general counsel issued a complaint, and therefore that the Supreme Court should uphold the Washington Supreme Court's decision to dismiss the state tort case.

The government disagrees with both parties. Taking Glacier's allegations as true, the government contends that, although strikes are Section 7 protected even where they result in some economic loss, strikes lose their protection when strikers fail to take "reasonable precautions to protect the employer's plant, equipment, or products from foreseeable imminent danger due to sudden cessation of work," *Bethany Med. Center*, 328 N.L.R.B. 1094 (1999), at least where the property damage is substantial or "aggravated," *Central Oklahoma Milk Producers Ass'n*, 125 N.L.R.B. 419 (1959), *enforced*, 285 F.2d 495 (10th Cir. 1960). Applying its reasonable-precautions test here, the government contends that the strikers' alleged conduct is unprotected to the extent that the strikers failed to take reasonable precautions to avoid foreseeable, imminent damage to Glacier's property.

The problem with all three positions is that they tend to go straight to the merits of the case—whether Section 7 protects strike conduct that resulted in damage to concrete. Glacier says never, because the strikers acted intentionally. The government says maybe, but not to the extent that the strikers failed to take reasonable precautions to prevent damage to Glacier's property. And the Union says that the activity was "arguably protected," and therefore that the state court was without jurisdiction. At question here is not, however, the underlying issue but rather which tribunal—the NLRB or the state court—should decide that question in the first instance. When the Washington Supreme Court dismissed the case, it did not hold that the conduct—abandoning fully loaded trucks—was protected, and therefore that there was no tort claim. It merely held that the Board could find that the action was protected, and therefore it deferred to the Board's primary jurisdiction to decide that issue. Presumably, were the Board now to decide that such conduct lost its protection, surely the state court could decide the state claim.

Labor law precedent does not definitively decide the tribunal question. *Sears* does not answer this question, because here, unlike in *Sears*, the union *did* file an unfair labor practice charge, and therefore there *is* an opportunity for the Board to decide the case. *Cf. Sears, Roebuck & Co. v. Carpenters* (permitting the state case to proceed and for the state court to resolve the federal question because the employer had no cause to bring the case before the Board and the union refused to do so).

The concurrences in *Sears* do shed some light on this case. Justice Harry Blackmun observed that the facts in *Sears* present a "jurisdictional no-man's land" that is "bridged" where the union files an unfair-labor-practice charge. Applying that theory here, where the union filed a charge in September 2017, just weeks after the strike, the state court properly dismissed the complaint so that the Board can decide the case. However, Justice Blackmun's attempt to bridge the no-man's land problem prompted Justice Lewis Powell to write a separate concurrence, pointing out that filing an unfair-labor-practice charge is often insufficient to cure the concerns prompted by the jurisdictional no-man's land—namely, an unacceptable delay in waiting for the general counsel to act. That prediction is prescient here, where the general counsel did not issue a complaint until January 2022, more than four years after the charges were filed.

In *Loehmann's Plaza*, 305 N.L.R.B. 663 (1991), the Board took seriously Justice Powell's warning and therefore took Justice Blackman's concurrence one step further, stating that the no-man's land is bridged once the general counsel issues a complaint on the union's charge:

> When the General Counsel issues a complaint alleging that [an employer] is violating Sec. 8(a)(1) by unlawfully interfering with union picketing or handbilling on its premises and if the General Counsel is aware of a pending state court proceeding in which the same matter is being litigated,…it would be beneficial for [the General Counsel] to issue simultaneously a notice to that court and to the [employer].…The notice will state that the Board is asserting jurisdiction over the [conduct] at issue, that state court jurisdiction is preempted until such time as the Board holds the [conduct] to be unprotected, and that the state court action should be held in abeyance pending the Board's decision.

The Board added that the notice would also inform the employer that "it may not actively pursue the lawsuit and that it has 7 days to seek a stay of the state court proceedings." The Board added that the general counsel should inform the employer that "it runs that risk of violating Sec. 8(a)(1) if it does not heed these instructions."

Here, too, a complaint was issued, but not until January 2022, one month after the Washington Supreme Court issued its decision dismissing the case. Accordingly, when the Washington Supreme Court disposed of this case, it presented a situation in between when the charge had been filed and a complaint issued.

Significance

This case presents an opportunity for the Court to clarify a difficult area of law—the jurisdictional no-man's land created by *Garmon* preemption. The merits of the case seem to depend on factual determinations that the Board should normally make in the first instance. But how long should a respondent, in this case the employer, have to wait until it knows whether its state law claim is preempted. It is now five years since the conduct in question occurred. The Board's hearing is set for January 2023. Even if that case proceeds expeditiously, it is difficult to imagine a scenario in which the Board would issue a decision, and an appellate court review that decision, faster than a state court deciding the issue.

This case presents a legal quagmire for the Court. The Court must navigate the murky waters of *Garmon* preemption combined with the muddy jurisdictional no-man's land presented by Justices Blackmun and Powell and the attempt to further bridge that gap in *Loehman's Plaza*. The Court needs to look carefully at the timing issue rather than be dragged into the underlying merits concerning whether the conduct at issue is protected.

Nevertheless, the Supreme Court could reach the merits. For the entire duration of the state case, the Board failed to act on a charge that the union had filed. In such a case, the Court could decide that a state case may proceed so long as the state court considers the federal interests at stake. This is a particularly likely outcome if the Court agrees with petitioner and the state intermediate court—that this activity is barely "arguably protected" because there is rarely, if ever, a circumstance under which this activity is protected. The Court could then decide that the employer should not have to wait for the Board to decide the merits. In these circumstances, the Court could conclude that the state court wrongly dismissed the matter and remand it to the state court for further proceedings consistent with its opinion. In such a case, the Court could provide guidelines about the extent to which Section 7 protects this conduct and at what point this conduct loses its protection.

Editor's note: The author of this article signed on in support of the amicus brief filed by Professor M. Bodie in support of the respondent.

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PREVIEW of United States Supreme Court Cases 50, no. 4 (January 9, 2023): 10–15.

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