IN THE SUPREME COURT OF OHIO

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL UNION NO. 33	:	
Appellee,	:	Supreme Court Case No. 08-00780
v.	:	
GENE'S REFRIGERATION, HEATING & AIR CONDITIONING, INC.	:	On Appeal from the Medina County Court of Appeals Ninth Appellate District Case No. 06CA0104-M
Appellant.	:	

BRIEF AMICUS CURIAE OF THE CONSTRUCTION EMPLOYER'S ASSOCIATION IN SUPPORT OF GENE'S REFRIGERATION, HEATING AND AIR CONDITIONING, INC.

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I. INTRODUCTION

The Construction Employers Association ("CEA"), the lead amicus, is a 501(c)(6) trade association that has served the Northeast Ohio area since 1916. An umbrella organization, CEA represents approximately 120 unionized construction companies and fourteen local contractor associations each of whom has its own membership. These fourteen contractor associations together with the Associated General Contractors of Ohio, Akron Division, join CEA in filing this amicus brief in an effort to relate to the Court their deep concern as to the mischief and damage to construction in Ohio that will follow unless the Ninth District's decision is overruled.

CEA negotiates labor contracts with sixteen unions in Northeast Ohio, including Bricklayers #5, Bricklayers #40, Bricklayers #46, Carpenters District Council, Cement Masons #404, Glaziers #181, Iron Workers #17, Laborers #310, Laborers #758, Millwrights #1871, Operating Engineers #18 (District 1), Pile Drivers #1871, Plasterers #80, Sheet Metal Workers #33 (Vermillion), Tapers #6, and Tile Layers #36.

Since 1967, the CEA has administrated the Construction Industry Service Program ("CISP") which serves more than 500 unionized contractors providing education, training, crime prevention, and safety programs, all designed to increase skills, abilities, and safety awareness in the unionized construction industry. Together with the Cleveland Building and Construction Trades, through collective bargaining, CEA has established and financed through CISP a substance abuse program designed to make the unionized construction trade drug free. Indeed, together with its union colleagues, CEA effectively establishes many of the prevailing wages in Ohio

Succinctly put, CEA is synonymous with the unionized construction trade in more than forty Ohio counties.

II. STATEMENT OF FACTS

The facts before the Court were stipulated by the parties in the Joint Motion for Reconsideration filed with the Magistrate on March 27, 2006:

Gene's Refrigeration, Heating & Air Conditioning, Inc. ("Gene's") is a construction contractor founded in 1959. (Nortz Aff. at ¶ 2). It performs plumbing, heating, ventilation, and air conditioning work for residential and commercial customers, which includes the sheet metal fabrication of duct work. (¶ 2). At all relevant times, Gene's is defined as a contractor under Ohio Adm. Code 4101:9-4-02(H). (¶ 7-8).

Sheet Metal Workers' International Association, Local Union 33 ("Local 33") has at all times relevant been a bona fide organization of labor, with its jurisdiction reaching Medina County, Ohio. (¶ 5). Local 33's negotiates with employers concerning wages, hours, or terms and conditions of employment of employees who perform sheet metal, heating, and cooling work. (¶ 6). Indeed, one of the affiliate associations of CEA is a bargaining partner of Local 33.

The construction project at issue is the Granger Fire Station Project ("Project") located in Medina County, Ohio. The Project is subject to the requirements laid out in Ohio's Prevailing Wage Law. (¶ 2-4). After submitting a bid for the Project, Gene was awarded a contract by the public authority. (¶ 9-10).

Gene's does not fabricate all of the duct work it uses in any given construction project. It frequently purchases prefabricated duct work from other manufacturing companies, such as Pulliam & Associates, Ohio Air, and Famous Supply. (Nortz Aff. at ¶ 6 and 7). Because the Project was so large, sheet metal duct work was purchased from other manufacturers and

installed. (Nortz Aff. at ¶ 7). Certain forms of duct work used on the Project, including round duct, snap-lock duct, and spiral duct are never fabricated by Gene's, and must always be purchased from other companies. (Nortz Aff. at ¶ 7). Conversely, Gene's also manufactures, distributes, and sells duct work it produces to smaller construction contractors and the public, rather than only manufacturing enough duct work for installation at the Project. (Nortz Aff. at ¶ 9).

Mr. Elie Cherfan, an employee of Gene's, worked exclusively at Gene's off-site metal fabrication shop. (¶ 12 and 15). Mr. Cherfan performed labor including the fabrication of duct work, some of which may have been installed on the Project. (¶ 16-17). However, Mr. Cherfan never performed any construction work at the actual jobsite of the Project. (Nortz Aff. at ¶ 3 and 4). During construction on the Project, Gene's paid all of its off-site fabrication shop employees, including Mr. Cherfan, at their regular, non-prevailing wage rates, which are lower than the jobsite prevailing wage rates. (¶ 18). On July 5, 2008, Mr. Cherfan signed an authorization card with Local 33, authorizing Local 33 to file a prevailing wage complaint on his behalf for the work he performed at Gene's sheet metal fabrication shop. (¶ 13). Mr. Cherfan is the sole Gene's employee who signed a form authorizing Local 33 to represent them in this action. No other contractor employing members of Local 33 submitted a bid, or otherwise worked on the Project.

III. PROCEDURAL HISTORY

A. The Trial Court's Decision

In September 2005, Local 33 filed an interested party prevailing wage complaint against Gene's pursuant to Ohio Rev. Code 4115.16(B). Local 33 alleges that Gene's violated Ohio's Prevailing Wage Law, Ohio Rev. Code 4115.03 *et seq.*, while it performed work on the Project.

In October 2005, Gene's filed its Answer and affirmative defenses, followed in December by a Motion for Summary Judgment on the basis that: (1) Local 33 lacked standing as an "interested party" to bring this prevailing wage lawsuit because Mr. Cherfan was the only individual who signed Local 33's union authorization card, and that he had never performed work on the public improvement Project at issue; and (2) that the off-site fabrication of metal duct work, i.e., "materials," is not and has never been subject to the provisions and requirements of Ohio's Prevailing Wage Law, even if such metal work was eventually installed on a public improvement project.

On December 27, 2005, Local 33 filed a Partial Motion for Summary Judgment claiming it had standing as an "interested party" to bring a prevailing wage complaint on behalf of all of Gene's employees, and that the off-site produced materials were subject to Ohio's Prevailing Wage Law. On March 7, 2006, the Magistrate denied both Motions for Summary Judgment because the parties failed to stipulate to undisputed facts. On March 27, 2006, the parties filed a Joint Motion for Reconsideration and stipulated to the facts presented above.

Following the Joint Motion and oral argument, the Magistrate granted Gene's Motion for Summary Judgment on April 27, 2006. Specifically, the Magistrate held that Local 33 only had standing as an "interested party" to sue on behalf of the one Gene's employee who signed the union authorization card. Additionally, the Magistrate held that the off-site fabrication work performed by the single employee was not subject to Ohio's Prevailing Wage Law. Local 33's Partial Motion for Summary Judgment was denied.

Following the Magistrate's decision, both parties filed written objections, the trial court adopted the Magistrate's decision in total and overruled the parties' objections, but failed to specifically state in the Order that Summary Judgment had been granted in favor of Gene's. On

June 13, 2006, Gene's filed a Motion for Attorney's Fees and Costs pursuant to Ohio Rev. Code 4115.16(D). On June 29, 2006, Local 33 filed a Notice of Appeal from the trial court's June 9, 2006 decision and filed a Brief in Opposition to Gene's Motion for Attorney's Fees pending before the trial court.

B. The Ninth District Court of Appeals' Decision

In August 2006, the Ninth District Court of Appeals dismissed Local 33's appeal for lack of a final appealable order. Local 33 later filed a Motion with the trial court requesting that the court enter a final appealable order, which it did on November 29, 2006. The final order held that: (1) Gene's Motion for Summary Judgment is granted; (2) Local 33's Motion for Partial Summary Judgment is denied; (3) Gene's Motion for Attorney's Fees and Costs pursuant to 4115.16(D) is denied; and (4) the parties' objections to the Magistrate's decision were overruled. Local 33 appealed the trial court's order granting summary judgment, and Gene's filed a Notice of Cross-Appeal from the trial court's order denying its Motion for Attorneys' Fees and Costs.

On March 10, 2008, the Court of Appeals, with Judge Slaby dissenting, reversed the decision on the trial court. The two judge majority held: (1) Local 33 had standing to represent employees on the "entire" Project and (2) that the off-site fabrication of "all materials to be used in or in connection with" a public improvement project is subject to Ohio's prevailing wage laws, effectively stating that this Court's long standing ruling in *Clymer v. Zane* (1934), 128 Ohio St. 359, 191 N.E. 123, 125 was superseded by a single sentence amendment to Ohio Rev. Code 4115.05 in 1935.

On April 24, 2008, Gene's filed a Notice of Appeal and a brief in support requesting the Ohio Supreme Court to accept this case for review based upon two propositions of law. On July 9, 2008, this Court accepted review on both propositions. Amicus wishes to comment on one these propositions of law.

IV. LAW AND ARGUMENT

Proposition of Law: Off-site fabrication or manufacturing of goods for a public improvement project is not subject to the requirements of the Ohio Prevailing Wage Act.

Since *Clymer v. Zane* (1934), 128 Ohio St. 359, the uniform law in Ohio has been that off-site fabrication or manufacturing of goods is not compensable under Ohio's Prevailing Wage Law. Two judges of the Ninth District Court have sought by judicial fiate to judicially amend Ohio's Prevailing Wage Law by erroneously applying a 1935 amendment that pertains to the Ohio Prevailing Wage Law. They contend that this 1935 Amendment overruled the then recently decided *Clymer v. Zane* such that "fabrication work" performed off the construction site would be compensable. Of course, for more than seventy years, no one was aware of this momentous change, giving new meaning to the phrase *sub silentio*.

In rationalizing their decision, the two judge majority stated that this amendment "overruled" *Clymer v. Zane* , stating:

> 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' Internat'l Assn., Local 33 v. Gene's Refrigeration, Heating & Air Conditioning, Inc. (11th Dist. March 10, 2008), 2008 WL 623407, 2008-Ohio-1005, at ¶ 39. Of particular note is the decision's use of the word "fabricate," which appears at no point in the statutory amendment that the two judges rely upon. *Clymer* addressed an issue involving employees in a gravel pit. Gravel is not fabricated material. Substitute in the Court's language either "manufacture" or "provide." That is the revolutionary proposition that is being presented. And, it is a proposition that frightens Amici and their membership.

The Ninth District has failed to realize that the amendment language referenced creates no basis to determine a prevailing wage. Indeed, within the same statutory section (Ohio Rev.

Code Section 4115.05), exists separate provisions dealing with work "on the site" and work "off-site." For work "on the site," the statute requires Commerce to utilize the collective bargaining agreement in force and effect. No such language exists in regard to "off-site" work.

A. Ohio Prevailing Wage Law

Ohio's Prevailing Wage Law is set out at Ohio Rev. Code Sections 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.

J.A. Croson v. J.A. Guy, Inc. (1998), 81 Ohio St. 3d 346, 349, 691 N.E. 2d 655, quoting *State ex rel. Evans v. Moore* (1982), 69 Ohio St. 2d 88, 91, 431 N.E. 2d 311. See also *Suhadolnik v. Ohio Dept. of Commerce* (2004), 157 Ohio App. 3d 561, 812 N.E. 2d 992 ("In other words, a person working on a public project must be paid union scale"). Indeed, as unionized contractors committed to the collective bargaining process, it is a law and a principle that Amici believe in.

Ohio's prevailing wage law applies to all construction projects that qualify as "public improvements." *See* Ohio Rev. Code 4115(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.* (Com Pls. 2004), 130 Ohio Misc. 2d 4, 2004-Ohio-7348. The Ohio General Assembly provides that there be adopted "reasonable rules" to facilitate the purpose of the Statute. Ohio Rev. Code 4115.12 (West 2001). Such regulations have been adopted. Ohio Adm. Code 4101:9-4 *et seq.* These regulations contain no provisions for off-site work, but only for determining wage rates "on the site of the 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). Amici negotiate these components in their negotiation with the trades.

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. As a result, the statute is strictly construed. *Dean v. Seco Electric* (1988), 35 Ohio St. 3d 203, 206, 519 N.E. 2d 837, 840. 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. All of which are the reasons that this decision causes Amici and its members such concern.

In its decision, the Ninth District majority has ignored the fact that these statutory requirements are aimed at the contractor and subcontractor, not the suppliers or fabricators. Yet, the decision makes the contractor and subcontractor the guarantor for the wages paid by unrelated suppliers and manufacturers including fabricators. The contractor and subcontractor already have a sufficient series of requirements during the course of the contract, including:

- Contractors required to have subcontractors pay prevailing rates.
- Observe apprenticeship requirements under a 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 required to make payments in accordance with the prevailing wage determination (Ohio Rev. Code 4115.031).
- Contractor or subcontractor must maintain full and accurate records (Ohio Rev. Code 4115.07).
- A prevailing wage coordinator must deal with contractors and subcontractors

(Ohio Rev. Code 4115.071).

See Ohio Rev. Code 4115.05, 4115.07, 4115.071(C). All such matters deal with project site requirements. There are similar obligations upon owners, who are to:

- Request wage rate schedules.
- Appoint a prevailing wage coordinator.
- Update the wage schedule as revisions are issued during the contract with the failure to do so subjecting the public owner to liability.

In fact, 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.

As seen above, the statute and the administrative regulations speak to "subcontractor," not "fabrication." The Ninth District decision would unfairly extend the phrase subcontractor to entities supplying materials that the contractor and/or subcontractor may be installing or incorporating into their work on a Project.

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 Sixth District performed the relevant legislative analysis, and concluded that the applicability of prevailing wage is employees who "do actual physical construction":

> [¶ 24] R.C. 4115.04 clearly states, "every public authority authorized to contract for or construction *with its own forces* (emphasis added) 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

those contracting public authority is further reinforced by review of related statutes.

B. The Statute Has No Mechanism to Provide a Prevailing Rate of Wages for Off-Site Work, Nor to Enforce Such a Provision

As explained above, Ohio Revised Code Section 4115.05 contains a provision for on-site work, and that the rate is set forth in collective bargaining agreements. The statute neither contains, nor creates a mechanism regarding how such rate is determined, other than it is to be in the county where the work is to be performed. Again, the Department of Commerce regulations only contain a provision for determining work performed "on the site of construction." Ohio Adm. Code 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 rate of such technicians, there was no prevailing rate to certify).

In *Ohio Asphalt Paving, Inc., supra*, this Court found that the contractor must pay the prevailing wage obligations "regardless of whether prevailing wage specifications were included in the contract." 63 Ohio St. 3d at 515. This Court went on to rule that the contractor can maintain a cause of action in contribution "on the part of the public authority for failing to comply with the prevailing wage provisions." *Id.* at 517. However, before either such remedy can occur, there must be a basis upon which the Department can make such a determination. A close look at the statute reveals there is no such basis. In such absence, the Department of Commerce is permitted to regulate. As set out in Section 1.49, Revised Code:

> If a statute is ambiguous, the court, in determining the intention of the legislature, may consider among other matters: (A) the object sought to be attained; (B) the circumstances under which the statute was enacted; (C) the legislative history; (D) the common law or former statutory provisions, including laws upon the same or similar subjects; (E) the consequences of a particular construction; (F) the administrative construction of a statute.

Thus, the statute as amended in 1935 provides no basis to make a determination for the rate for off-site work, despite establishing one for on-site work.

C. The Judicial Amendment to the Statutory Amendment

The majority of the Ninth District conceded the overwhelming complexity that would be caused by the requirement all wages paid for materials incorporated into the project. Addressing this issue, the Ninth District rewrote the statute by attempting to limit its holding to fabrication. Logically it cannot:

> 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. So for instance, if a special system for handling elephants in the new Cleveland Metroparks Elephant Exhibit were fabricated by a Company in Texas, some type of prevailing wage would be required.

Had the Court read further on in the statute, it would have found the paragraph of 4115.03, which reads:

> 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 jobsite, specifically that the work be performed on-site.

D. The Decision of the Court in *Clymer v. Zane* Formed No Basis to Extend the Ohio Prevailing Wage Law to Fabricators of Materials Manufactured for the Site

The *Clymer* case (*Clymer v. Zane* (1934), 128 Ohio St. 359, 191 N.E. 123) dealt with a contractor's employees who worked in an off-site gravel pit. The employees worked for a contractor, and they provided sand and gravel to be used in a public improvement project. The issue presented to 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 or brick factory is owned or operated by the contractor in charge of the public improvement. Such a construction would likely lead to conflicts with regulations and 'codes' governing wages of other industries.

While the reasoning for the decision including all materials furnished, the case was narrow in its application: a gravel pit. Again, gravel is not a fabricated material.

The Ninth District Court in *Gene* limits its opinions to materials fabricated for the work site, yet this was not even the issue in *Clymer*. And such a restriction makes no logical sense. Its statement that the Amendment to the prevailing wage law applies to work "fabricated" for the site is unsupportable.

E. Prevailing Wages Applying to Off-Site Manufacturing is Completely Unfeasible, Unworkable, and Unenforceable

The potential for mischief inherent in the Ninth District's off-site manufacturing holding is apparent when applied to Ohio's Prevailing Wage Law. The Ninth District's holding is effectively endless, and of great concern to the CEA, its approximately 120 unionized construction companies, and its affiliate associations and their members. For example, any business dealing with sheet metal products, like corrugated sheet metal for the exterior of a building or the flashing of a roofing system, would be responsible for paying construction industry wages for off-site metal workers. A window manufacturer, cabinet maker, or door manufacturer would have to pay their employees "carpenters prevailing wages;" glass makers for windows or mirrors would pay glazier's rates; manufacturers of air conditioning units, boilers or heaters would pay millwright, electrician, pipe fitter, and sheet metal rates; the list has no end. And, the contractor or subcontractor becomes responsible for any payment no made. As mentioned above, CEA negotiates labor contracts with sixteen trades in Northeast Ohio, ranging from bricklayers to plasterers and tile layers. The Ninth District's reasoning will directly lead to conflicts in collective bargaining agreements, as well as collision with federal labor laws.

The Ninth District's decision raises the question of where the reach of Ohio's Prevailing Wage Law begins and ends. Mr. Nortz, Gene's Project Manager, stated in his affidavit that Gene's fabrication shop consists mainly of reviewing job blueprints and specifications, speaking to clients on the phone, fabricating duct work, driving to pick up materials for the fabrication shop, making deliveries, loading and unloading trucks, cleaning up the fabrication shop, and any other job related duties specified by the supervisor. (Nortz Aff. at ¶ 5). Fabricating duct work is not a job exclusively performed by any employee working in Gene's fabrication shop. Should Mr. Cherfan be paid prevailing wages for picking up the metal that will later become duct work?

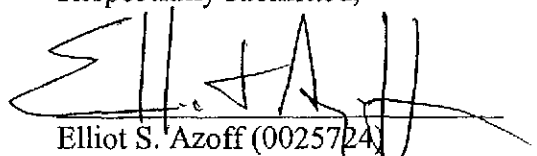
And what if the metal is loaded into a truck and mixed with metal that is not destined for a prevailing wage jobsite? Must he be paid prevailing wage for all of his time, since it is impossible to effectively separate the activities? What about the manufacturer of window frames installed in a building? Is the contractor responsible if that manufacturer does not pay its employees a carpenter's rate? Or then again, should the rate be that of the glazier? From these simple examples, it is obvious that the enforcement of Ohio's Prevailing Wage Law for off-site work would be, practically speaking, impossible.

From applying *Clymer* and reading Ohio Rev. Code Section 4115.05 *in pari materia* with the rest of the provisions of Ohio's prevailing wage statute, including the administrative code, it is evident that the two judge majority of the Ninth District, as the dissent so poignantly points out, misinterpreted the language contained in the Code. Reversing the Ninth District's decision will return Ohio Prevailing Wage Law to a status quo that has existed for the last 74 years. Contractors and subcontractors will be able to bid on Public Projects without concern of endless litigation and possible liability. Certainty will be returned to the law.

V. CONCLUSION

For the reasons set forth above, *Amici Curiae* urge the Court to reverse the decision of the Ninth District.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Brief of Construction Employers Association As Amicus Curiae was served by ordinary mail, postage prepaid, on this 26th day of August, 2008, upon the following:

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