IN THE SUPREME COURT OF OHIO

CITY OF CLEVELAND,	:	Case No. 2018-0097
	:	
Plaintiff-Appellee,	:	On Appeal from the
	:	Cuyahoga County Court of Appeals,
v.	:	Eighth Appellate District
	:	
STATE OF OHIO	:	Court of Appeals
	:	Case No. 105500
Defendant-Appellant	:	

BRIEF OF AMICUS CURIAE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 18 IN SUPPORT OF DEFENDANT-APPELLANT STATE OF OHIO

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STATEMENT OF INTEREST OF AMICUS CURIAE

The International Union of Operating Engineers, Local 18 ("Local 18" or "Union") is a labor organization that represents the interests of nearly 15,000 operating engineers working in 85 of Ohio's 88 counties along with four counties in northern Kentucky. Headquartered in Cleveland, Local 18 maintains five district offices located in Cleveland, Toledo, Akron, Columbus, and Middletown. Each district serves a distinct region of the Union's total geographical jurisdiction. Operating engineers work in a variety of fields, including building and highway construction, heavy industrial construction and maintenance, mining, utilities, pipeline, and petrochemical industries. In order to effectively represent its membership, the Union has historically negotiated with a variety of multiemployer trade associations, such as *amicus curiae* Ohio Contractors Association ("OCA"). The results of these negotiations are collective bargaining agreements ("CBAs"), binding both Local 18 and signatory employers.

All of these CBAs contain the same policy and procedure for an exclusive hiring hall system that ensures impartial and non-discriminatory employment opportunities for Local 18 members. While this system has a number of moving parts, all applicants in Local 18's hiring hall are equitably referred to work based on two essential criteria: 1) whether their self-reported qualifications meet the demands of the employer's work order; and 2) the length of time they have been registered for work. Any aberration from this rubric, such as a residency requirement, has the potential to expose Local 18 to extensive liability, given that it is legally obligated to fairly operate its exclusive hiring hall under the dictates of both the National Labor Relations Act ("NLRA") and federal court order.

When the General Assembly enacted R.C. 9.75, it prohibited public authorities – such as municipalities – from mandating that construction contractors – such as those with which the Union negotiates CBAs – must hire a certain number of employees who reside "within the defined

geographic area or service area of the public authority" to perform work on public-construction contracts. As the session law indicates, this prohibition enjoys the supremacy protections found in Article II, Section 34 of the Ohio Constitution because it clearly provides for the "general welfare" of employees who obtain work under Local 18's exclusive hiring hall by "allow[ing] employees working on Ohio's public improvement projects to choose where to live." H.B. 180 §§ 3-4. If upheld, R.C. 9.75 will ensure that these employees continue to receive job referrals under the only two criteria for which the Union is permitted to complete job orders: 1) the job requirements; and 2) referral seniority. If this Court does not reverse the opinion of the lower court, more Ohio cities may pass and impose ordinances similar to Cleveland's Fanny Lewis Law. Accordingly, Local 18 will be confronted with the untenable proposition that a residency requirement becomes an element of its referral practices, thereby penalizing its members who would otherwise be qualified for work under the hiring hall's existing policy. The Union thereby becomes trapped between the proverbial rock and a hard place as these aggrieved employees suffer violations of their rights under federal labor law due to an unwarranted excess of home rule discretion. R.C. 9.75 was designed to curb this excess, and Local 18 therefore urges that the Court uphold its constitutionality.

STATEMENT OF THE CASE AND FACTS

Local 18 adopts the Statement of the Case and Facts set forth in Appellant's Merit Brief.

ARGUMENT

Proposition of Law No. 1: R.C. 9.75 is a valid exercise of authority under Article II, Section 34 because it ensures that the thousands of employees represented by Local 18 receive work purely through a referral seniority and merits-based system, thereby providing for the general welfare of employees.

"It is difficult to conceive of a matter more vital to the general welfare of an employee than a freedom to choose the community or neighborhood in which to live." *State, County, and Municipal Employees Local #74 v. City of Warren*, 177 Ohio App.3d 530, 2008-Ohio-3805, 895

N.E.2d 238, ¶ 55 (11th Dist.), *aff'd.* 122 Ohio St.3d 545 (2009). Local 18's representation of its members in Ohio's construction industry upholds this freedom because it operates a strictly merits-based hiring hall.

An applicant first becomes eligible for employment through the hiring hall by visiting one of Local 18's five district offices and filling out a registration card that indicates the type of equipment the applicant is capable of operating, any special certifications possessed by the applicant, and the counties in which the applicant is willing to work. The Union then time- and date-stamps the registration card and places it into a referral deck based upon that stamp and the number of years the applicant has worked as an operating engineer.

When a signatory employer wants to hire an operating engineer, it must call the Local 18 dispatcher at the Union district office covering the geographic location of the job and place a work order. The employer must indicate the equipment needed, any specific certifications required, the location and start date of the job, and the identity and phone number of the employer's supervisory representative to whom the applicant must report for work. The dispatcher subsequently completes a work order form that memorializes this information and fills the order by searching the referral decks for an applicant's registration card with the earliest time- and date-stamp that shares the job requirements specified by the employer. Once found, the dispatcher contacts the applicant to offer them the job.

If the applicant fails to answer, the dispatcher leaves a message asking that they contact Local 18 and memorializes this occurrence on the applicant's work order form. The dispatcher waits ten minutes for the applicant to return the call before moving on to the next qualified applicant. If the applicant fails to return the call or declines the job offer, the dispatcher memorializes this occurrence on both the back of the work order form and the applicant's

registration card. The dispatcher then continues to locate the registration card with the next earliest time- and date-stamp that shares the job requirements specified by the employer. If the dispatcher is unable to fill the job after reviewing all registered out-of-work applicants, the dispatcher faxes the order to another district to complete the same process. At bottom, the hiring hall operates on a "first-in, first-out" basis, guaranteeing that work opportunities are offered to the first qualified individual that has been out of work for the longest period of time.

In operating its exclusive hiring hall, Local 18 owes the employees it represents a duty of fair representation ("DFR"), which "'arises from the National Labor Relations Act[.]'" *Operating Engineers Local 18 (Precision Pipeline)*, 362 NLRB No. 176, *7 (2015), quoting *United Steelworkers of Am. v. Rawson*, 495 U.S. 362, 373, 110 S.Ct. 1904, 109 L.Ed 2d. 362 (1990). Specifically, if a union "engage[s] in conduct concerning a bargaining unit employee that is arbitrary, discriminatory, or in bad faith," it has breached this duty and violated Section 8(b)(1)(A) of the NLRA. *Amalgamated Transit Union Local No. 1498 (Jefferson Partners L.P.)*, 360 NLRB 777, 778 (2014).[1] "Within the Union's broad duty of fair representation there exist a number of more specifically defined obligations in the exclusive hiring hall context." *Operating Engineers Local 627 (Ok. Commercial and Indus. Builders and Steel Erectors Assn.)*, 359 NLRB 758, 764 (2013). Accordingly, "any departure [by the union] from established exclusive hiring hall procedures which results in a denial of employment to an applicant falls within that class of discrimination which . . . breaches the duty of fair representation owed to all hiring hall members, and violates Section 8(b)(1)(A)" of the NLRA. *E.g., Operating Engineers Local 406 (Ford, Bacon & Davis Constr. Corp.)*, 262 NLRB 50, 51 (1982), *enfd.* 701 F.2d 504 (5th Cir. 1983).

[1] Section 8(b)(1)(A) provides that "[i]t shall be an unfair labor practice for a labor organization . . . to restrain or coerce employees in the exercise of the rights guaranteed in section 7" of the NLRA.

All applicants in Local 18's hiring hall are fairly and non-discriminatorily referred to work based on two essential criteria: 1) whether their self-reported qualifications meet the demands of the employer's work order; and 2) the length of time they have been registered for work. Residency requirements by the contractor play no role in this two-pronged rubric. There is good reason for why such requirements are excluded in Local 18's exclusive hiring hall: construction projects are both fluid and temporary in nature, and jobsites constantly change. Local 18 members are always travelling to available projects within the large span of each Union District in which they have registered (or even into another District if they agree to accept a job there). Moving from city to city for various short-term projects is simply unfeasible. Introducing a residency requirement would impose undue hardships on operating engineers, violate the Union's merits-based referral system, and thus constitute a blatant violation of Local 18's DFR to its members. Moreover, the Union operates its referral system pursuant to terms imposed in 1982 by the District Court for the Northern District of Ohio in *Murphy v. Operating Engineers Local 18*, 99 LRRM 2074 (N.D. Ohio 1978). Unsurprisingly, these terms do not permit consideration of residency requirements in the issuance or completion of referrals. To acquiesce to this factor would be an express violation of Local 18's legal obligations. Exposure – and thereby defense – to unneeded liability based upon municipal residency requirements does not promote the welfare of Local 18's members which the Union is charged with maintaining, especially given that Local 18 is funded entirely by membership dues.

The Supreme Court of Ohio "has repeatedly interpreted Section 34, Article II as a broad *grant* of authority to the General Assembly, not as a limitation on its power to enact legislation." *E.g., Am. Assn. of Univ. Profs. v. Cent. State University*, 87 Ohio St.3d 55, 61, 717 N.E.2d 286 (1999). (Emphasis sic.) The legislature's authority to enact law under Article II, Section 34 is

designed "to address and modify . . . existing concern[s]" in "situation[s] where the public interest necessitated legislative intervention." *Id*. The equitable operation of hiring practices in Ohio's public construction industry brought forth through collective bargaining is no doubt in the public interest. The livelihoods of thousands of operating engineers potentially hang in the balance. Collective bargaining is designed to ensure, among other desired objectives, that individuals receive employment in a predictable and fair manner.

Because R.C. 9.75 upholds the promise of a merits-based referral system through Local 18's exclusive hiring hall by the prohibition of residency requirements, it clearly embraces the letter and spirit of Article II, Section 34, providing for the enactment of statutes promoting the general welfare of employees. As such, R.C. 9.75 is constitutional even if it "impair[s] the obligations of contracts" because under the plain language of Article II, Section 34, any other "provisions of the state . . . inhibiting" the impairment of such contracts "do not affect this power of the state to enact legislation directed to establishing the 'comfort, health, safety and general welfare of all employees.'" *Vincent v. Elyria Bd. of Edn.*, 7 Ohio App.2d 58, 61, 281 N.E.2d 764 (9th Dist. 1966.) While this limitation on the constitutional home-rule provision – Article XVIII, Section 3 – may seem harsh, it "was adopted *at the same time* as was the home-rule section[.]" *City of Kettering v. State Employment Relations Bd.*, 26 Ohio St.3d 50, 57, 496 N.E.2d 983 (1986). (Emphasis sic.) Indeed, "[i]t should be obvious that the drafters . . . consciously included, in Section 34, Article II, a broad grant of authority to pass laws 'for the comfort, health, safety and general welfare of all employees' and then provided further that no other provision of the Constitution shall limit the power to enact legislation for the welfare of employees. If this section is read in the way in which it is written, there is no conflict on this subject between state legislative authority and the power granted local governments under home rule." *Id*. R.C. 9.75 is a valid

exercise of authority under Article II, Section 34, and accordingly, the Eighth District's decision should be reversed.

CONCLUSION

The presumption of legislative constitutionality "can only be overcome only in the most extreme cases[.]" *Cent. Ohio Transit. Auth. v. Transport Workers Local 208*, 37 Ohio St.3d 56, 62, 524 N.E.2d 151 (1988). Local 18 respectfully submits that this is not one of those cases. Instead, R.C. 9.75 unambiguously provides for the general welfare of employees by permitting thousands of operating engineers represented by Local 18 throughout Ohio to receive work on public improvement projects purely on the basis of skill and hiring hall seniority. Introducing any other factors upends industrial stability for these employees and potentially exposes the Union to a plethora of liability. Accordingly, the Court should uphold the constitutionality of R.C. 9.75, reverse the judgment of the Eighth District, and enter judgment in favor of Appellant state of Ohio.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing *Brief of Amicus Curiae International Union of Operating Engineers, Local 18 in Support of Defendant-Appellant State of Ohio* was served by U.S. mail, with sufficient postage, this 2nd day of July, 2018, on the following:

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