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U.S. SUPREME COURT DEALS BLOW TO LABOR, ILLINOIS RESPONDS

On June 1, 2023, in an eight-to-one decision, the United States Supreme Court opened up the ability for employers to sue unions for damages if the workers go on strike. The case, *Glacier Northwest v. International Brotherhood of Teamsters*, was argued before the Court in January of 2023. The lone dissenter was Justice Ketanji Brown Jackson.

Glacier Northwest is a concrete company located in Washington State. The company mixes and delivers concrete in its own mixing trucks. The employees of the company are represented by International Brotherhood of Teamsters Local 174. The case alleged that the unionized workers timed their strike after some of the trucks had been filled with concrete, thus causing the company's non-union employees to scramble to remove the concrete before it hardened in the trucks causing significant damage. The non-union workers were able to dispose of the wet concrete over the course of five hours. The company then filed a tort case (injury to property and lost profits) in Washington state court over the lost product, claiming the union intentionally damaged and destroyed the concrete. The union moved to dismiss the complaint, arguing that the issue was preempted by the National Labor Relations Act. The trial court granted the motion to dismiss, the appellate court reversed, and the Washington State Supreme Court reinstated the trial court's decision. The Washington State Supreme Court held, "the NLRA preempts Glacier's tort claims related to the loss of its concrete product because that loss was incidental to a strike arguably protected by federal law." Glacier Northwest then appealed to the U.S. Supreme Court.

The Glacier Northwest strike fell in a grey area of case law regarding protections for strike conduct. One line of cases had established that a union has a clear legal right to strike, even if the strike results in destruction of perishable goods, for example milk delivery and cheese production. Another line of cases found that striking workers could not walk off the job at a time that could result in damage to the employer's equipment, for example pouring molten iron. The Glacier case falls between these two, since, allegedly, the strike did not take place until the concrete was mixed, at which point it becomes perishable.

What the Court decision in this case changed was the process by which these types of grey-area cases were handled procedurally. Prior to the Supreme Court's ruling in *Glacier*, the National Labor Relations Board ("Board") had initial jurisdiction over "arguably" protected activity to determine if the alleged conduct of the union was protected under the National Labor Relations Act ("the Act"). If the Board found that the conduct was protected, the state courts would have no jurisdiction over the issue. If the Board found that it was not protected conduct under the Act, the employer could sue the union in state court. This procedure was established under *San Diego Trades Council v. Garmon*, 359 U.S. 236 (1959), and is commonly referred to as a *Garmon* preemption.

The Court's decision in *Glacier* now allows an employer to pursue its state law claims before the NLRB determines whether or not the underlying activity is protected. In the Court's opinion, emphasis was placed on the fact that the union "put Glacier's property in foreseeable and imminent danger." The opinion, written by

Justice Coney Barret, did say that had the union, for example, instructed the drivers to strike *before* loading the cement into the trucks, it could have been a different case. The opinion emphasized that "the Union's decision to initiate the strike during the workday and failure to give Glacier specific notice do not themselves render its conduct unprotected." What is unclear from the ruling is exactly when or how the union's conduct in calling a strike puts the employer's property in foreseeable and imminent danger.

The Court's decision largely guts *Garmon* preemption. This sets up a tough situation for unions where they may be faced with defending a matter in two forums, state court and the NLRB. The ruling also does not address what happens if the Board finds that the activity is protected under the Act and the state court finds the union liable for its conduct. These are the scenarios that *Garmon* preemption was intended to address. Indeed, while the *Glacier* case was pending in the Supreme Court, there has been an unfair labor practice case at the NLRB alleging unfair conduct by the employer, and the dissenting justice wrote that the NLRB case should be decided before the court litigation was decided.

On June 9, 2023, unions in Illinois received some protections from the impact of the Supreme Court's *Glacier* ruling. Governor Pritzker signed HB 2907, amending the Illinois Labor Disputes Act. HB 2907 amended that Act to provide that no award for monetary damages, except for damages done as the result of conduct prohibited by law, can be granted by a state court in any case involving a labor dispute. The amendment, in application, will prevent striking unions from being sued for unlawful property damage as a result of a strike. Legal challenges to the amendment may be filed as employer attempt to carry the *Glacier* holding to its furthest applications. Unions need to be watchful as to the nature to their strikes in order to prevent lawless actions that may result in property damage.

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