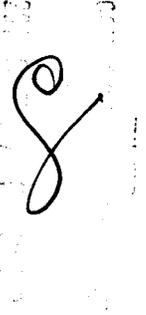


65092-1

65092-1

NO. 65092-1-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON



ENOS D. FERGUSON

Appellant,

vs.

INTERNATIONAL ALLIANCE OF THEATRICAL STAGE
EMPLOYEES, LOCAL 15, an international union; and
THYSSENKRUPP SAFWAY, INC., fka SAFWAY SERVICES,
INC.

Respondents.

**RESPONDENT INTERNATIONAL ALLIANCE OF
THEATRICAL STAGE EMPLOYEES, LOCAL 15's BRIEF**

Harold B. Field, WSBA #11020
William W. Spencer, WSBA #9592
Of Attorneys for Respondent International Alliance
Of Theatrical Stage Employees, Local 15
MURRAY, DUNHAM & MURRAY
200 West Thomas, Ste. 350
PO Box 9844
Seattle WA 98109-0844
Phone: (206) 622-2655
Fax: (206) 684-6924

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I. STATEMENT OF THE CASE

The appellant was employed by the Lakeside Group (hereinafter “Lakeside”) to operate lights during a concert performance.¹ Since 2003, Lakeside has run a summer series of approximately 15 concerts in Marymoor Park between June and September each year, pursuant to an agreement with King County.² The appellant has been regularly employed by Lakeside as a stagehand and lighting operator at many of these concerts since the early 1990s.³

The appellant is a member of the local chapter of the International Alliance of Theatrical Stage Employees Local 15 (hereinafter “Union”). The Union and Lakeside entered into a collective-bargaining agreement (hereinafter “CBA”) to determine the “wages, hours, benefits, and working conditions” of employees dispatched by the Union for work with the employer.⁴ Under the CBA, Lakeside, as the employer, assumed all safety responsibilities.

¹ CP280, CP525, CP708-709, CP 679.

² CP280.

³ CP281.

⁴ CP999.

The CBA did not assign any safety responsibilities to the Union.⁵ The CBA does not specify how work should be performed. Control of the manner and methods of performing job tasks remains with the employer, Lakeside.⁶

The CBA classifies Lakeside employees by title, and provides for different hourly rates for different classifications of workers.⁷ One of the job classifications is for a “lead” worker, which is akin to a foreman.⁸ All Union workers on this job were employed and paid exclusively by Lakeside, through a payroll service.⁹

In the normal course of events, the union stewards act as regular employees. Only where there are disputes regarding interpretation of the contract, or in the performance of a certain function such as preparation of the payroll, do the stewards act as stewards rather than as typical employees. The Union President, Laurel Horton, in describing the duties of a job steward, testified:

⁵ CP1104.

⁶ CP999.

⁷ CP1170.

⁸ CP307, CP1170.

⁹ CP525, CP526.

In a way, the job steward has nothing to do as long as everything goes right. The job stewards are engaged when someone has a problem. ... It's like what they call a shop steward in many unions.¹⁰

This lawsuit involves construction of a spot tower with access ladders. One of the access ladders became detached from the spot tower causing the appellant to fall and injure himself. One of the members of the crew dispatched by the Union to work for Lakeside, John Poulson, is accused of not properly tightening a nut on a clamp attaching the ladder to the spot tower. Mr. Poulson denies this allegation.¹¹

The CBA provides that the employer shall involve the job steward "in any question concerning the interpretation or enforcement of this Agreement."¹² There were no questions regarding the interpretation or the enforcement of the Agreement during the course of this job. During construction of the spot tower John Poulson was acting as an ordinary employee of Lakeside.¹³

¹⁰ CP1288.

¹¹ CP1293-CP1294.

¹² CP1179.

¹³ CP1278.

At the job site, the appellant, Mr. Poulson, and the other members of the crew, including the appellant, were under the control of Larry Huffines, Lakeside's production manager. All of the crew was under the ultimate control of Mr. Huffines' boss, David Littrell of Lakeside.¹⁴ Mr. Littrell is the founder, president, and owner of Lakeside.¹⁵ As stated by Mr. Littrell in his Declaration:

All of the crew are under my ultimate control and I will give them direction and fire them at will when necessary.

As the employer of all the workers dispatched by the Union, Lakeside had the power to give directions to the workers, including directions on sequencing and staffing.¹⁶ Under the CBA, the employer, Lakeside, retained all rights to conduct its business in the manner it deemed appropriate.¹⁷

In this appeal, the appellant abandons the claim of direct negligence directed at the Union. The only issues identified by the appellant, in his appeal, pertaining to the Union, are a claim of

¹⁴ CP1112.

¹⁵ CP1110.

¹⁶ CP536.

¹⁷ CP1179.

vicarious liability, from Mr. Poulson's conduct, and the applicability of federal pre-emption.¹⁸

II. ARGUMENT

A. MR. POULSON WAS NOT ACTING AS AN AGENT OF THE UNION IN ERECTING THE SPOT TOWER.

Mr. Poulson had two distinct roles at Marymoor Park on the date of the accident. First, he was a lead worker for Lakeside. Second, he was a union steward. As a steward, Mr. Poulson was obligated, under the CBA, to become involved in any question concerning the interpretation or enforcement of the CBA. The CBA provides:

ARTICLE 5 – ACCESS TO PREMISES AND JOB STEWARDS

...

5.2 The Employer agrees to recognize the Job Steward appointed by the Union as the employee's on-site representative of the Union and to involve the Job Steward in any questions concerning the interpretation or enforcement of this Agreement.

...

¹⁸ Brief at pp. 20-34.

The issue is whether, in erecting the spot tower, Mr. Poulson was acting as an agent of his employer, Lakeside, or as an agent of the Union. The answer to this question depends upon whether Lakeside or the Union had the right to control the manner in which Mr. Poulson erected the spot tower. Since Lakeside had the right to control the manner of Mr. Poulson's performance in erection of the spot tower, Mr. Poulson was acting as Lakeside's agent in erecting the spot tower. The only situation when Mr. Poulson would have acted as an agent of the Union would concern labor disputes or issues involving interpretation of the CBA.¹⁹

In *Stansfield v. Douglas County*, 107 Wash. App. 1, 18, 27 P.3d 205 (2001), the court defined the type of control necessary to establish agency:

[27] 'Control is not established if the asserted principle retains the right to supervise the asserted agent merely to determine if the agent performs in conformity with the contract. Instead, control establishes agency **only if the principle controls the manner of performance....**' *Uni-Com N.W., Ltd. v. Argus Publ'g Co.*, 47 Wash. App. 787, 796-97, 737 P.2d 304 (1987) (quoting *Bloedel Timberlands*

¹⁹ CP1107-1108.

Dev., Inc. v. Timber Indus. Inc., 28 Wash. App.
669, 674, 626 P.2d 30 (1981))

The Union had no right, under the CBA or otherwise, to control the manner in which Mr. Poulson erected the spot tower. The CBA provides that “the employer retains all rights except as those rights are limited by the express and specific language of the provisions of this Agreement,”²⁰ and further provides that nothing in the CBA “shall be construed to impair the rights of the Employer to conduct its business except as expressly and specifically modified in this agreement.”²¹

In the present case, Mr. Poulson is accused of negligently constructing a spot tower. The right to construct a spot tower, and the means and methods of doing so, are retained by the employer under the CBA. In erecting the spot tower, Mr. Poulson was acting as an agent of Lakeside, not as an agent of the Union.

²⁰ CP1179.

²¹ CP1179.

The appellant argues that the Union “had a right to control [Mr. Poulson’s] work as a steward.”²² However, Mr. Poulson was not performing his duties as a union steward in erecting the spot tower. He was doing so under the direction and control of Lakeside, for the benefit of Lakeside.

The appellant cites three cases in support his vicarious liability argument: *O’Brien v Heafer*, 122 Wash. App. 279, 93 P.3d 930 (2004); *Woods v. Graphic Communications*, 925 F.2d 1195 (9th Cir. 1991) and *Baxter v Morningside Inc.*, 10 Wash. App. 893, 521 P.2d 946 (1974). While these cases contain useful discussions of general agency principles, they do not provide any support for the appellant’s claim that Mr. Poulson was acting as an agent of the Union in erecting the spot tower. Neither *Baxter* nor *O’Brien* involved an issue of a Union’s vicarious liability. Those cases involved car accidents and the issue was whether the owner of the car was vicariously liable for the conduct of the driver.

The only agency case cited by the appellant involving a union is the *Woods* case. In *Woods*, an African American union member

²² Brief, p. 24

sued the union for racial discrimination. A union steward made racially offensive remarks and “jokes.” When making these racially offensive remarks, the individual was acting as a shop steward, albeit contrary to union policy regarding discrimination.

In our case, Mr. Poulson was not acting as a union steward in erecting the spot tower. Mr. Poulson’s duties as a shop steward pursuant to the CBA, were to become involved in “...any question concerning the interpretation or enforcement of this Agreement.”²³ Erecting a spot tower was not a function of a union steward, but rather a function of a lead worker for Lakeside.

The Ninth Circuit has opined on the issue of union steward agency in cases other than *Woods*, and those cases, like *Woods*, are limited strictly to the acts or omissions of stewards in carrying out (or failing to carry out) their duties as union stewards. *Simo v. Union of Needletrades, Industrial & Textile Employees*, 322 F.3d 602 (9th Cir. 2001) dealt with a labor dispute and union stewards’ tortious conduct in connection with that dispute.

²³ CP1179.

Similarly, in *National Labor Relations Board v. Int'l Longshoremen's and Warehousemen's Union, Local 10*, 283 F.2d 558 (9th Cir. 1960), the issue was whether the denial of work to a longshoreman who was suing the local union constituted an unfair labor practice.

The instant case involves none of the issues addressed in *Woods, Simo*, or *National Labor Relations Board*, because Mr. Poulson was simply not acting in his capacity as a union steward in constructing the spot tower, but rather in his capacity as an employee of Lakeside.

There are negative public policy implications of the appellant's expansive view regarding the scope of Union vicarious liability. The appellant's position is that a Union is vicariously liable for any conduct of an individual designated as a steward regardless of whether the steward's alleged negligence involves Union business. This expansive view of vicarious liability, if adopted by this court, would subject Unions to substantial new liability exposure. This, in turn, would damage the financial stability of Unions and impair their ability to effectively represent Union

members. As the court noted in *Dutrisac v. Caterpillar*, 749 F.2d 1270, 1274 (1983):

A weakening of the union's financial stability might, in turn, impair their ability to function effectively as collective bargaining agents.

B. INDUSTRIAL IMMUNITY PRECLUDES A VICARIOUS LIABILITY CLAIM AGAINST THE UNION.

The appellant and John Poulson were employees of Lakeside.²⁴ The appellant did not, and could not, sue Mr. Poulson because, as a co-worker, Mr. Poulson is immune from suit by virtue of the Industrial Insurance Act, RCW 51.04.010. The appellant claims that the Union is vicariously liable for the conduct of Mr. Poulson. Specifically, The appellant alleges:

. . . the Union is liable for any negligence by its Steward John Poulson because the uncontradicted evidence shows he was its agent.²⁵

The case of *Brown v. Labor Ready NW, Inc*, 113 Wash. App 643, 54 P.3d 166 (2002) is dispositive regarding industrial insurance immunity. In *Brown*, the plaintiff was injured by the negligence of a

²⁴ CP525, CP538, CP708-9, CP679.

co-worker. She sued Labor Ready, claiming it was viciously liable for the tort of the co-worker. The Court of Appeals rejected this contention, reasoning:

Vicarious liability depends upon the liability of the negligent agent to the injured the plaintiff; if a plaintiff is barred from suit against the negligent employee, she cannot sue the employer on a theory of vicarious liability. An employee injured by a co-worker's negligence is limited to the remedies provided by Washington's workers compensation system; she may not sue the co-worker for his negligence.²⁶

John Poulson cannot be liable to the appellant because, as a co-worker, he is immune from suit under the Industrial Insurance Act. Since vicarious liability depends upon the liability of the negligent agent to the injured appellant, the appellant's theory of vicarious liability must be rejected.²⁷

In sum, the appellant's vicarious liability argument should be rejected for three reasons. First, Mr. Poulson was not acting as an

²⁵ Brief, p. 24.

²⁶ *Brown, supra*, pp. 646-647.

²⁷ *Brown, supra*, p. 646.

agent of the Union in erection of the spot tower. Second, the Industrial Insurance Act immunizes the Union from vicarious liability for the conduct of the appellant's co-worker. Third, public policy does not support the expansion of Union liability where the Union member is not performing a Union function but rather an ordinary function for the employer.

C. CLAIMS AGAINST THE UNION ARE PRE-EMPTED BY FEDERAL LAW, AND UNDER FEDERAL LAW, DISMISSAL IS APPROPRIATE.

The court need not reach the federal pre-emption issue if it decides in the Unions favor on either the industrial immunity issue or the agency issue. If this court reaches the pre-emption issue, the court should conclude that the Labor Management Relations Act ("LMRA") pre-empts state law, and that an action under the LMRA is precluded by the mandatory arbitration clause and by the applicable statute of limitations.

Congressional power to legislate in the area of labor relations is well established. Congressional power to pre-empt state law is derived from the Supremacy Clause of Article VI of the Federal Constitution. *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 6 L.Ed. 23

(1824). *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 56 S.Ct. 615, 81 L.Ed. 893 (1937). However, Congress has never exercised authority to occupy the entire field in the area of labor legislation. As a result, when addressing issues regarding labor relations, state courts must determine whether state law is pre-empted by federal law. In determining whether pre-emption applies, the intent of congress controls. *Malone v. White Motor Corp.*, 435 U.S. 497, 504, 98 S.Ct. 1185, 1190, 55 L.Ed.2d 443 (1978). Congress did not state explicitly whether and to what extent it intended § 301 of Labor Management Relations Act (“LMRA”) to pre-empt state law. *Malone, supra* at 504.

Section 301 of the LMRA states:

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce ... may be brought in any district court of the United States having jurisdiction of the parties ...

29 U.S.C. § 185(a).

In *Allis v. Chalmers Corp. v. Lueck*, 471 U.S. 202, 105 S.Ct. 1904, 85 L.Ed.2d 206 (1985). The Supreme Court held that § 301 of

the LMRA pre-empts tort actions where "... resolution of a state-law claim is substantially dependent upon the analysis of the terms of an agreement made between the parties to the labor contract ...". *Allis v. Chalmers, supra* at 220. The Supreme Court explained the rationale for the pre-emption doctrine in this context:

[T]he subject matter of § 301(a) 'is peculiarly one that calls for uniform law' . . . The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements. Because neither party could be certain of the rights which it had obtained or conceded, the process of negotiating an agreement would be made immeasurably more difficult ... Once the collective bargain was made, the possibility of conflicting substantive interpretations under competing legal systems would tend to stimulate and prolong disputes as to its interpretation ... [and] might substantially impede the parties' willingness to agree to contract terms providing for final arbitral or judicial resolution of disputes.²⁸

²⁸ *Allis v. Chalmers, supra* at 210, quoting *Teamsters v. Lucas Flower Co.*, 369 U.S. 95, 103, 82 S.Ct. 571, 576, 7 L.Ed.2d 593 (1962).

In *United Steelworkers of America v. Rawson*, 495 U.S. 362, 110 S.Ct. 1904, 109 L.Ed.2d 362 (1990) survivors of miners killed in a mine fire sued the miner's union, alleging negligence in the performance of safety investigations. The appellant's arguments against pre-emption were accepted by the Idaho Supreme Court, which reasoned as follows:

According to the Supreme Court of Idaho, the Union may be liable under state tort law because its duty to perform that inspection (safety inspection) reasonably arose from the fact of the inspection itself rather than the fact that the provision for the Union's participation in mine inspection was contained in the labor contract.²⁹

The United States Supreme Court rejected this rationale of the Idaho Supreme Court:

As we see it, however, respondents' tort claim cannot be described as independent of the collective-bargaining agreement. This is not a situation where the Union's delegates are accused of acting in a way that might violate the duty of reasonable care owed to every

²⁹ *Rawson* at 370-371.

person in society ... If the Union failed to perform a duty in connection with inspection, it was a duty arising out of the collective-bargaining agreement ... Pre-emption by federal law cannot be avoided by characterizing the Union's negligent performance of what it does on behalf of the members of the bargaining unit pursuant to the terms of the collective-bargaining contract as a state-law tort. Accordingly, this suit, if it is to go forward at all, must proceed as a case controlled by federal, rather than state, law. *Rawson* at pp. 371-372.

In *Electrical Workers v. Hechler*, 481 U.S. 851, 107 S.Ct. 2161, 95 L.Ed.2d 791 (1987) the Supreme Court held that an employee's state-law tort suit against her union for breach of the union's duty to provide a safe workplace must be treated as a claim under federal labor law. The Supreme Court reasoned that the union's duty to provide a safe workplace, if any, arose from the CBA, because under common law, it is the employer, not the labor union, that owes employees a duty to provide a safe workplace. The Supreme Court stated:

Under the principle set forth in *Allis-Chalmers*, we must determine if respondent's claim is sufficiently independent of the collective-bargaining agreement to withstand the pre-emptive force of § 301. Respondent's state-law tort claim is based on her allegation that the Union owed a duty of care to provide her with a safe workplace and to monitor her work assignments to ensure that they were commensurate with her skills and experience. **Under the common law, however, it is the employer, not a labor union, that owes employees a duty to exercise reasonable care in providing a safe workplace.** *See, e. g.,* W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on The Law of Torts* 569 (5th ed., 1984); *White v. Consolidated Freight Lines*, 192 Wash. 146, 148, 73 P.2d 358, 359 (1937). (Emphasis supplied).

In the present case, the CBA addresses, specifically and in detail, the relationship between the employer, Lakeside, and the Union. The claim against the Union is preempted because the resolution of the claim of agency is substantially dependent upon an analysis of the terms of the CBA. The CBA contains the following

terms, defining the roles of Lakeside and the Union, which are relevant to the issue of agency: (1) Mr. Poulson was a lead worker for Lakeside, as well as being a Union Steward. The classification of a “lead” and the pay rate for leads, are set forth in the contract;³⁰ (2) Lakeside retained all rights, except as specifically limited by the terms of the CBA, including the right to conduct its business;³¹ (3) The duties of a union steward, as opposed to a lead worker, are limited to questions concerning interpretation or enforcement of the CBA;³² (4) All safety duties are assigned to Lakeside and none to the Union;³³ (5) All power tools were provided by Lakeside, and none by the Union;³⁴ (6) Under some circumstances, Lakeside was required to provide employee meals. The Union was not required to do so;³⁵ and (7) Lakeside retained the right to maintain a set of rules and requirements and to discharge employees for failure to abide by those rules and requirements. The Union had no such power.³⁶

³⁰ CP1170.

³¹ Article 4.1 CP1179.

³² Art 5.2, CP1178.

³³ Art 7, CP1179-80.

³⁴ Art 8.7, CP1181.

³⁵ Art 10, 6.2., CP1186-1187.

³⁶ Art 14, CP1190.

The issue of agency requires an analysis of Mr. Poulson's relationship with Lakeside and with the Union. In erecting the spot tower, did Lakeside have the right to control Mr. Poulson's means of performance or did the Union? Resolution of that issue, central to the agency analysis, requires an interpretation of the CBA, including the provisions set forth above. Since resolution of the agency claim "...is substantially dependent upon the analysis of the terms of an agreement made between the parties to the labor contract..." pre-emption applies.³⁷

Washington appellate courts have rejected pre-emption if, and only if, the appellant's claim exists by virtue of common law and/or statutes, and can be maintained without any reference to, or reliance upon, a Collective Bargaining Agreement. For example, in *Commodore v. University Mechanical Contractors*, 120 Wn.2d 120, 839 P.2d 314 (1992) the plaintiff's claims for defamation, outrage, racial discrimination and tortious interference with a business relationship were not pre-empted because those causes of action exist independent of a Collective Bargaining Agreement and proof

³⁷ *Allis v. Chambers, supra* at 220.

of elements of the claim does not require reference to or reliance upon the CBA.

In *Rhodes v. Evergreen Utilities Contractors*, 105 Wash. App. 419, 20 P.3d 460 (2001) a plaintiff was allowed to pursue a claim against an apprenticeship program because the claim arose from assurances made by the director of the apprenticeship program and from the terms of a statute, the National Apprenticeship Act (29 U.S.C. § 50). The court held:

[6] Whether or not these federal and state regulations and standards establish a duty to Mr. Rhodes and Mr. Hester, the fact remains that their claims are based on duties arising from these sources and from assurance made by the director of the JATC, not from terms of the CBA. Because the claims sound in tort arise from state common law and do not require reference to or interpretation of the terms of the CBA, they are not preempted under § 301. *Commodore*, 121 Wn.2d at 130-31, 839 P.2d 314.

In our case, the appellant's claim against the Union does not arise from assurances made by a director of an apprenticeship program or from a statute. The claim arises from the relationship between the Union and the employer, as defined by the CBA. The centrality of the CBA is illustrated by the fact that during the 61-

page deposition of the Union President, Laurel Horton, and the CBA was discussed on at least 30 occasions.³⁸

The Union's role in this Marymoor Park concert is defined by the CBA. The relationship between the Union and the employer is defined by the CBA. The roles of job stewards are defined by the CBA. Safety duties are assigned by the CBA. A viable cause of action against the Union cannot possibly be maintained without reference to and reliance on the CBA. Federal law pre-empts state law.

If the court concludes that the appellant's claim against the Union is pre-empted by §301 of the LNRA³⁹, then dismissal is the appropriate remedy because the appellant failed to pursue mandatory arbitration, and because the applicable six month statute of limitations expired. *Allis v. Chalmers Corp. v. Lueck*, 471 U.S. 202, 105 S.Ct. 1904, 85 L.Ed.2d 206 (1985); *DelCostello v. Teamsters*, 462 U.S. 151, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983); 29 U.S.C. § 160(b).

III. CONCLUSION

The trial court properly dismissed the appellant's claim against the Union for three reasons. First, Mr. Poulson was not

³⁸ CP1273-1287, CP1290.

³⁹ 29 USC §185(a).

acting as an agent of the Union in erecting the spot tower for Lakeside. Second, the Union is immune from this suit by virtue of the Industrial Immunity Statute. Third, the appellant's claim against the Union is preempted by federal law, and under federal law, dismissal is appropriate. This Court should affirm the Trial Court's dismissal of the Union on Summary Judgment.

RESPECTFULLY SUBMITTED this 26th day of October, 1010.

MURRAY, DUNHAM & MURRAY

By:  ~~WSBA #35344~~
for ~~Harold B. Field, WSBA #11020~~
William W. Spencer, WSBA #9592
of Attorneys for Respondent
IATSE Local 15

DECLARATION OF SERVICE

I hereby certify, under penalty of perjury, under the laws of the State of Washington that on this day the original of the affixed document was filed with the courts below and served on the following attorneys by U.S. Postal Service, postage prepaid, a true copy of the affixed document:

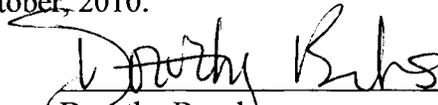
Washington State Court of Appeals Via Legal Messenger
Division One
One Union Square
600 University Street
Seattle WA 98101

John Budlong Via Legal Messenger
Faye Wong
Law Offices of John Budlong
100 Second Avenue South, Ste. 200
Edmonds WA 98020

Jeffrey Eden Via Legal Messenger
Barbara Rhoads-Weaver
Bree Kame'enui-Ramiez
Bullivant Houser Bailey
1601 Fifth Avenue, Ste. 2300
Seattle WA 98101

Jerrett E. Sale Via Legal Messenger
Deborah L. Carstens
Bullivant Houser Bailey
1601 Fifth Avenue, Ste. 2300
Seattle WA 98101

Dated this 28th day of October, 2010.


Dorothy Brooks