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No. 87877-3

SUPREME COURT
OF THE STATE OF WASHINGTON

LAWRENCE HILL, ADAM WISE, AND ROBERT MILLER,
on behalf of themselves and all persons similarly situated,

Petitioners,

v.

GARDA CL NORTHWEST, INC.,

Respondent.

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SUPREME COURT
STATE OF WASHINGTON
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BRIEF OF AMICI CURIAE OF WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION, WASHINGTON STATE LABOR COUNCIL AND SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 925, LOCAL 6, HEALTHCARE 775NW, AND HEALTHCARE 1199NW IN SUPPORT OF PETITION FOR REVIEW

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On Behalf Of
Washington Employment Lawyers Association
Washington State Labor Council
Service Employees International Union Local 925, Local 6,
Healthcare 775NW, Healthcare 1199NW

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I. IDENITY AND INTEREST OF AMICI

Washington Employment Lawyers Association is comprised of approximately 143 Washington attorneys dedicated to the enforcement of state and federal law protecting individual employment rights. The Washington State Labor Council is a prominent advocate for the interests of working people and families in Washington, representing approximately 550 local and statewide unions associated with the AFL-CIO, which in turn represent approximately 450,000 members. The Service Employees International Union locals, associated with Change to Win, advocate for approximately 100,000 members in health care, long-term care, childcare, public services, education, and property services in Washington State. *See* Declaration of Kathleen Phair Barnard.

II. STATEMENT OF THE CASE

Petitioners are approximately 300 messengers and drivers ("Employees") employed, or previously employed, by Garda CL Northwest ("Garda") in Washington who sued Garda in Superior Court because they were denied meal and rest breaks in violation of the Washington Industrial Welfare Act, RCW 49.12, and Minimum Wage Act, RCW 49.46. CP 7. Garda defended by arguing that the Employees had waived their right to a judicial forum for those claims because each collective bargaining agreement ("CBA") for each Garda location

contained an identical provision which, in Garda's view, required each employee to arbitrate any employment issue individually. The trial court certified the class but ordered arbitration on a class basis, and both parties appealed that decision. The Court of Appeals ordered that each Employee would have to individually arbitrate his or her claim. *Hill v. Garda CL Northwest*, 169 Wn. App. 685 (2012), *rev. granted*, 176 Wn.2d 1010 (2013). The Employees appealed.

III. ARGUMENT

A. THE COURT OF APPEALS ERRED IN COMPELLING ARBITRATION BECAUSE THE CBAS DO NOT FORECLOSE ACCESS TO WASHINGTON'S COURTS

1. CBAs That Contain Contractual Rights Identical To Public Law Rights Or That Do Not Subject Public Law Claims To Arbitration As The Exclusive Forum For Enforcement Do Not Waive The Statutory Right To A Judicial Forum

The right to litigate public law claims in court is a statutory right, which, under governing law, may be waived by a union only through a CBA that both expressly incorporates the law at issue and expressly makes arbitration the exclusive forum for enforcement of that right.

a. Statutory claims are not presumptively arbitrable under a CBA.

In order to further national labor policy, the National Labor Relations Act ("NLRA") requires a presumption that disputes arising out of a CBA must be arbitrated rather than litigated in court. Because a CBA is the

result of collective bargaining to establish the contractual rights and the work rules for the duration of one CBA ("the law of the shop"), arbitrators with expertise suitable for determining the contractual rights of the parties, rather than the courts, are called upon to decide contractual disputes, which are presumed to be arbitrable. *See Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 78, 119 S. Ct. 391, 142 L. Ed. 2d 361 (1998).[1]

Under long established precedent, the presumption of arbitrability does not extend to claims which arise in public law because national labor policy is not implicated in the resolution of public law claims, including those arising from statutes. *Wright*, 525 U.S. at 78. *See also, Metropolitan Edison Co. v. NLRB,* 460 U.S. 693, 708, 103 S. Ct. 1467, 75 L. Ed. 2d 387 (1983) (there is no presumption of arbitrability for statutory claims under the NLRA).

CBAs may contain purely contractual rights that are similar, or even identical, to statutory rights but yet remain "the law of the shop" not the

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[1] *See also, AT&T Technologies, Inc. v. Communications Workers of Am.*, 475 U.S. 643, 650-51, 106 S. Ct. 1415, 1419, 89 L. Ed. 2d 648 (1986) (The "presumption of arbitrability for labor disputes recognizes the greater institutional competence of arbitrators in interpreting collective-bargaining agreements, furthers the national labor policy of peaceful resolution of labor disputes and thus best accords with the parties' presumed objectives in pursuing collective bargaining.")(internal quotations and citation omitted); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 648, 105 S. Ct. 3346, 3365, 87 L. Ed. 2d 444 (1985) (the "'special role of the arbitrator ... is to effectuate the intent of the parties rather than the requirements of enacted legislation.... the specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land.'") (quoting *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-583, 80 S. Ct. 1347, 1352-1353, 4 L. Ed. 2d 1409 (1960)).

law of the land. *Mathews v. Denver Newspaper Agency LLP*, 649 F.3d 1199, 1207 (11th Cir. 2011), citing *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 262 (2009), and *Gardner–Denver*, 415 U.S. at 53–54, 94 S. Ct. 1011. Those contractual rights do not displace the statutory rights they mimic, and enforcement of them does not preclude court enforcement. *Id.* Even where the CBA expressly incorporates statutory rights in clear and unmistakable terms, there is no presumption that the statutory rights are subject to arbitration. *Mathews v. Denver Newspaper Agency LLP*, 649 F.3d 1199, 1207 (10th Cir. 2011) (citing *Alexander v. Gardner–Denver Co.*, 415 U.S. 36, 94 S. Ct. 1011, 39 L. Ed. 2d 147 (1974)). Nor does incorporation of statutory rights preclude enforcement in court, unless they are subject to arbitration as the sole and exclusive forum for enforcement.

b. To waive access to a judicial forum, the CBA must be clear and unmistakable in expressly incorporating statutory claims and in precluding enforcement in court.

Although the Court of Appeals acknowledged that the standard set forth in *Wright*, 525 U.S. at 79, governs whether a CBA provision waives employees' statutory right to a judicial forum, it erred in applying that standard. To effectuate such a waiver, a CBA must contain express, clear and unmistakable provisions demonstrating the intent to incorporate statutory rights (not merely contractual rights defined by reference to

statutes), and demonstrating that those claims are subject to arbitration as the exclusive forum for remedy. The CBAs at issue here do neither.

In *Wright*, the Court held that if unions had the power to prospectively waive bargaining unit members' statutory rights of access to court, the waiver would have to be "explicitly stated," and "clear and unmistakable." 525 U.S. at 80.[2] *See also*, *Pyett*, 556 U.S. at 274 (holding that unions do have that authority and that a CBA which explicitly stated in clear and unmistakable terms that specific statutory claims were incorporated into the contract and that arbitration under the CBA was the sole and exclusive forum for enforcing those claims would waive access to a judicial forum).[3] Therefore, while a union may waive employees' rights to a judicial forum for their public law claims, that can be done only by expressly incorporating the statutory requirements into the CBA which an arbitrator is expressly empowered to adjudicate through the sole and exclusive forum of arbitration. *Pyett,* 556 U.S. at 265-66. First, to overcome the normal expectation that a CBA embodies only contractual obligations

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[2] Because the rights arguably being waived by the union were statutory rights arising from public law, not rights arising from a contract negotiated by the union, the Court adopted the longstanding standard under the NLRA for union executed waivers of bargaining unit members' statutory rights. *Id.* at 79-80 (citing *Metropolitan Edison Co. v. NLRB,* 460 U.S. 693, 103 S. Ct. 1467, 75 L. Ed. 2d 387 (1983), and *Mastro Plastics Corp. v. Nat'l Labor Relations Bd.*, 350 U.S. 270, 281, 76 S. Ct. 349, 357, 100 L. Ed. 309 (1956). Because that standard was not met by the CBA at issue in *Wright*, the Court did not reach the question of whether union's bargaining authority extended to such a waiver. 525 U.S. at 397.

[3] In *Pyett*, the employee plaintiffs conceded that the waiver was sufficiently explicit and clear and unmistakable. 556 U.S. at 272.

(although those contractual obligations may be identical to obligations created by statute), there must be "a clear and unmistakable incorporation" into the CBA of the specific statutory right for which judicial access was allegedly waived. *Wright,* 525 U.S. at 79, 81. Second, the requirement that the statutory claim can be vindicated only through arbitration must be explicit and clear and unmistakable. *Id.* at 79-80.

Even if statutory rights are incorporated into the CBA, that alone does not waive the right to access court because there is no presumption that those statutory rights are arbitrable. In *Wright*, the Court rejected the employer's argument that the plaintiff's ADA claim could not proceed in court because the CBA "did not incorporate the ADA by reference, [and[e]ven if it did so, however—thereby creating a contractual right that is coextensive with the federal statutory right—the ultimate question for the arbitrator would be not what the parties have agreed to, but what federal law requires; and that is not a question which should be *presumed* to be included within the arbitration requirement." 525 U.S. at 78, 79.[4] Therefore, the second condition must also be met to accomplish prospective waiver of employees' access to court for those claims: there

[4] The Court pointedly stated that the presumption of arbitrability ordinarily applied to grievances under a CBA did not apply to preclude the litigation of statutory claims in court. *Wright*, 525 U.S. at 78 (The presumption of arbitrability "does not extend beyond the reach of the principal rationale that justifies it, which is that arbitrators are in a better position than courts *to interpret the terms of a CBA*.") (emphasis in original)

must be clear and unmistakable language in the CBA making arbitration the exclusive forum for those claims. *Id.* at 79-80.

2. The CBAs Here Do Not Waive the Employees' Access To Court Because They Do Not Specifically Incorporate Causes Of Action Under The Washington Industrial Welfare Act And Minimum Wage Act And Because The CBAs Do Not Subject Those Causes of Action To Arbitration As The Exclusive Forum.

a. The CBAs define contractual rights by reference to public law and do not incorporate statutory claims.

The Court of Appeals erred in holding that "arbitration agreements require employees to submit *any* claim under *any* federal, state or local law to the grievance procedure outlined in the arbitration agreement[, including] wage claims under chapter 49.52 RCW and chapter 49.12 RCW." *Hill*, 169 Wn. App. at 695. The court failed to correctly apply *Wright* or to address the subsequent decision in *Pyett* and the myriad of cases decided after *Wright* and *Pyett* which adhere to the rule that contract rights which parallel statutory rights do not supplant the statutory rights. Only a CBA that expressly incorporates specific statutory rights explicitly made subject to arbitration as the sole and exclusive forum for redress would meet the dual requirement of express incorporation and explicit waiver of employees' right to seek redress in a judicial forum for those statutory rights. *Id.* at 258-59. The CBA in *Pyett* provided:

> **There shall be no discrimination** against any present or future employee **by reason** of race, creed, color, age, disability, national origin, sex, union membership, or **any other characteristic protected by law, including,** but not limited to, claims made pursuant to Title VII of the Civil Rights Act, the Americans with Disabilities Act, **the Age Discrimination in Employment Act,** the New York State Human Rights Law, **the New York City Human Rights Code,** ... or any other similar laws, rules, or regulations. **All such claims shall be subject to the grievance and arbitration procedures ... as the sole and exclusive remedy for violations.**

556 U.S. 251-52 (internal quotation marks omitted) (emphasis added). Such a clause would waive access to court for claims under the ADEA and the New York State Human Rights Law. *Id.* at 256-57.[5] Subsequent cases decided have consistently held that CBAs that define contract claims with reference to statutory standards do not meet the first of the two requirements to waive judicial access, the specific incorporation of public law claims. In *Mathews*, the CBA provided:

> The Employer and the Union acknowledge continuation of their policies of no discrimination against employees and applicants on the basis of age, sex, race, religious beliefs, color, national origin or disability in accordance with and **as required by applicable state and federal laws.**

649 F.3d 1199, 1206 (11th Cir. 2011) (emphasis added). The Court rejected the argument that discrimination statutes were incorporated,

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[5] This result differed from those cases in which the contractual and statutory rights were held to be distinct because, as the Court noted, the CBAs in those cases "did not expressly reference the statutory claim at issue," unlike the CBA at issue in *Pyett. Id.* at 263–264 (discussing *Alexander,* 415 U.S. 36, *McDonald v. West Branch,* 466 U.S. 284, 104 S. Ct. 1799, 80 L. Ed. 2d 302 (1984), and *Barrentine v. Arkansas–Best Freight System, Inc.,* 450 U.S. 728, 101 S. Ct. 1437, 67 L. Ed. 2d 641 (1981)).

holding that the CBA did not encompass "statutory claims ... [because] the 'distinctly separate nature' of contractual and statutory rights ... does not change even though the contours of the CBA's anti-discrimination protections were defined by reference to federal law." *Id.* at 1206 (quoting *Gardner–Denver*, 415 U.S. at 50, 54). *See also*, *Pyett*, 556 U.S. at 263.

In *Ibarra v. United Parcel Serv.*, the CBA provided:

> The Employer and the Union agree not to discriminate against any individual ... because of such individual's race, color, religion, sex, sexual orientation, national origin, physical disability[,] veteran status or age in violation of any federal or state law, or engage in any other discriminatory acts prohibited by law, nor will they limit, segregate or classify employees in any way to deprive any individual employees of employment opportunities because of race, color, religion, sex, national origin, physical disability, veteran status or age in violation of any federal or state law, **or engage in any other discriminatory acts prohibited by law. This Article also covers employees with a qualified disability under the Americans with Disabilities Act.**

695 F.3d 354, 357 (5th Cir. 2012) (emphasis added). The Court held that this provision did not incorporate statutory rights into the CBA because "[u]nder *Gardner–Denver*, an employee's statutory and contractual rights remain independent even if the contours of the CBA's antidiscrimination protections [are] defined by reference to federal law." *Ibarra*, 695 F.3d at 358 (internal quotations omitted). "[P]ost-*Wright* courts appear to be in agreement that a statute must specifically be mentioned in a CBA for it to

even approach *Wright* 's 'clear and unmistakable' standard." *Id.* at 360, n. 37 (quoting *Bratten v. SSI Servs., Inc.*, 185 F.3d 625, 631 (6th Cir.1999)).[6]

Here, the CBAs define contractual rights by reference to public law by stating that employees may file grievances alleging that statutory standards have been violated. The CBAs define a grievance as:

> a legitimate controversy, claim or dispute by an employee, shop steward or the Union concerning rates of pay, entitlement to compensation, benefits, hours, or working conditions set forth herein, including without limitation, claims of harassment or discrimination or hostile work environment in any form, ... or any claim of retaliation for making any such or similar claim, or the interpretation or application of this Agreement or any agreement made supplementary thereto, or any claim under any federal, state or local law, statute or regulation or under any common law theory whether residing in contract, tort or equity or any other claim related to the employment relationship.

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[6](internal quotations and citations omitted). *See also*, *Cavallaro v. UMass Mem. Healthcare, Inc.*, 678 F.3d 1, 7 & n. 7 (1st Cir. 2012) ("a broadly-worded arbitration clause ... will not suffice; rather something closer to specific enumeration of statutory claims to be arbitrated is required") (citations omitted)); *Powell v. Anheuser-Busch Inc.*, 457 F. App'x 679, 680 (9th Cir. 2011) (no waiver of access to court under a CBA that did not explicitly incorporate the plaintiff's disability discrimination claim under the California Fair Employment and Housing Act because the court "will not interpret a CBA to waive an individual employee's right to litigate statutory discrimination claims unless the CBA waiver 'explicit[ly] incorporat[es] ... statutory antidiscrimination requirements") (quoting *Wright*, 525 U.S. at 80); *Harrell v. Kellogg Co.*, 2012 WL 3962674, *7 (E.D. Pa. 2012) (CBA which explicitly referenced ADA but not 42 U.S.C. § 1981 did not waive access to judicial forum for Section 1981 action because "a statute must specifically be mentioned in a CBA for it to even approach *Wright's* 'clear and unmistakable' standard."); *Martinez*, 2010 WL 3359372 (CBA making compliance with California state wage order subject to arbitration exclusive remedy, but which did not specifically express the wage statutes at issue in the court litigation, did not constitute forum waiver); *Peterson v. New Castle Corp.*, 2011 WL 5117884, *2 (D. Nev. 2011) (no waiver of a judicial forum because the CBA "nowhere explicitly indicates that the employee waives the right to sue under Title VII or other anti-discrimination statutes" because it "does not mention these statutes by name, and it does not even state generally that the right to litigate under discrimination statutes is waived or must be arbitrated .... ").

CP 142-143, 206-207, 229-230. These CBAs create contractual rights which parallel but do not supplant the Employees' statutory rights. The CBAs do not explicitly state that the Washington Industrial Welfare Act and Minimum Wage Act are incorporated. Thus, the first prerequisite for waiver of a judicial forum has not been met. *See, e.g.*, *Ibarra*, 695 F.3d at 360, n. 37; *Cavallaro,* 678 F.3d at 7 & n. 7; *Bratten*, 185 F.3d at 631; *Powell*, 457 F. App'x at 680; *Harrell*, 2012 WL 3962674, *7; *Peterson v. New Castle Corp.*, 2011 WL 5117884, *2; *Martinez*, 2010 WL 3359372. *Compare*: *Pyett*, 556 U.S. at 263–264. Nor, as explained below, do the CBAs subject statutory claims to arbitration.

b. CBAs, like those at issue here, do not waive access to a judicial forum because they do not contain express and clear and unmistakable language making statutory claims subject to arbitration in lieu of enforcement in court.

There is no presumption that statutory claims are arbitrable, and the CBAs here do not explicitly make public law claims arbitrable as the sole and exclusive means of enforcement. Therefore, the Court of Appeals erred when it rejected the Employees' argument that an arbitration agreement must contain an explicit statement that arbitration is the parties' exclusive remedy and instead ***presumed*** that the CBA waived the Employees' right to pursue their claims in court. *Hill*, 169 Wn. App. at 696 (citing *Minter v. Pierce Transit,* 68 Wn. App. 528, 531-32 (1993), and

Republic Steel Corp. v. Maddox, 379 U.S. 650, 653 (1965)). This ruling is directly contrary to the long line of NLRA precedent stretching from *Metropolitan Edison Co.,* 460 U.S. at 708, and *Mitsubishi Motors Corp.*, 473 U.S. at 648, through *Wright*, 525 U.S. at 578, and *Pyett*, 556 U.S. at 258 (all holding that no such presumption exists for statutory claims).

In *Pyett*, the CBA explicitly referenced the Age Discrimination in Employment Act, subjected that claim to "arbitration procedures ... as the sole and exclusive remedy for violations," and stated that arbitrators "shall apply appropriate law in rendering decisions based upon claims of discrimination." 556 U.S. at 252. This, the Court held was an "agreement to arbitrate statutory antidiscrimination claims" that was "explicitly stated" and, the plaintiffs conceded, was sufficiently explicit to constitute the clear and unmistakable language the Court required to effectively waive access to court for their age discrimination claims. *Id.* at 258-259.[7]

The *Mathews* Court held that it could not "be argued that the arbitration agreement required submission of statutory claims ...." 649 F.3d at 1207. "By its own terms, the arbitration agreement applied only to disagreements 'as to the interpretation, application or construction *of this contract* [i.e. the CBA], including all disputes involving discharge or

[7] In contrast, a collective bargaining agreement giving the arbitrator "authority to resolve only questions of contractual rights," does not preclude bringing statutory claims in court "regardless of whether certain contractual rights are similar to, or duplicative of, the substantive rights secured by" statutes. *Pyett*, 556 U.S. at 263.

discipline,'" *Id.* (emphasis added by the court). Moreover, the arbitration provision, "from which the arbitrator derived all authority stated that "[t]he arbitrator shall have no power to add to, subtract from, change or modify any provision of this Agreement, *but shall be authorized only to resolve the dispute submitted to him or her.*" *Id.* at 1207-08 (emphasis added by the Court).

Similarly in *Ibarra*, the grievance arbitration procedure set forth in Article 51 of the CBA defined grievance as "any controversy, complaint, misunderstanding or dispute arising as to interpretation, application or observance of any of the provisions of this Agreement" and committed "any grievance, complaint, or dispute" to a procedure which "culminate[d] in submission of a grievance to an arbitrator...." 695 F.3d at 357-358. Despite the fact that the parties had agreed in Article 51 to commit ***any complaint or dispute*** to arbitration, the Fifth Circuit rejected the employer's contention that "Title VII claims [were] within the scope of the controversies, complaints, and disputes that must be resolved via the grievance procedures set forth in Article 51," even though "the nondiscrimination rights guaranteed by the CBA [in Article 36 were] coterminous with those under federal and state law." *Ibarra*, 695 F.3d at 358. This was so "because Article 36 mention[ed] no specific federal or state statutes and ma[de] no reference to the grievance procedures set forth

in Article 51" and because the "CBA contain[ed] no express waiver of a judicial forum for claims brought pursuant to Title VII." *Id.* at 357. *See also*, *Peterson,*, 2011 WL 5117884, *2 (holding that there had been no waiver because the CBA "nowhere explicitly indicates that the employee waives the right to sue under Title VII or other anti-discrimination statutes" or "even state[s] generally that the right to litigate under discrimination statutes is waived or must be arbitrated .... ")

Here, the CBAs define grievances as including disputes defined by generic references to statutes and common law. Despite the fact that the contours of some grievances are defined by reference to statutory claims, those claims remain contractual. Moreover, the arbitration clause nowhere indicates that statutory claims are subject to arbitration or that access to court is waived for statutory claims. The arbitration provisions at issue here are similar to that in Mathews—they do not expressly state that statutory claims are arbitrable, and limit the arbitrator's authority by stating that the arbitrator is not allowed to "amend, take away, modify, add to, change, or disregard any provision" of the CBAs. CP 142-143; 206-207, 229-230. Because the CBAs here do not contain clear and unmistakable provisions explicitly incorporating the wage statutes or waiving the Employees' access to Washington courts to enforce their rights to wages owed, this Court should reverse.

B. EVEN IF THE CBAS WAIVED THE EMPLOYEES' ACCESS TO COURT, THEY ARE NOT ENFORCEABLE HERE, WHERE IT WOULD WORK AN UNLAWFUL WAIVER OF THE SUBSTANTIVE STATUTORY PROTECTIONS.

A reading of the CBA to preclude access to court for the statutory claims here works a waiver of the substantive protections of the state statutes, contrary to federal law. In *Pyett,* the plaintiffs argued that their substantive rights under the ADA and New York Human Rights Law could not be vindicated because the union declined to arbitrate those claims. While acknowledging that "a substantive waiver of federally protected civil rights will not be upheld," the Court declined to resolve whether the CBA operated "as a substantive waiver" of their statutory rights because the record did not disclose whether the CBA required, or even allowed, the plaintiffs to arbitrate without the union. 559 U.S. at 273-274.[8] Subsequent cases make it clear that, if access to the only forum for vindication of statutory rights is controlled by the union which prevents arbitration, the waiver may not be given effect. *See, e.g., Brown v. Servs. For The Underserved*, 2012 WL 3111903 (E.D.N.Y. 2012); *de Souza Silva v. Pioneer Janitorial Servs., Inc.*, 777 F. Supp. 2d 198 (D. Mass. 2011); *Morris v. Temco Serv. Indus., Inc.*, 2010 WL 3291810 (S.D.N.Y.

[8] (citing *Mitsubishi.*, 473 U.S. at 637, and n. 19). *See also, Pyett,* 556 U.S. at 285 (Souter, J., dissenting) ("the majority opinion ... explicitly reserves the question whether a CBA's waiver of a judicial forum is enforceable when the union controls access to and presentation of employees' claims in arbitration, which is usually the case.")

2010); *Kravar v. Triangle Servs., Inc.*, 2009 WL 1392595 (S.D.N.Y. 2009).

Here, any request by Employees to arbitrate would almost certainly have been a futility because the union does not have the resources to arbitrate and has never done so. CP 606-607, 571-72. Therefore, the case should be remanded to the trial court with instructions to allow the Employees to test their ability to arbitrate, and if not allowed, to resume the class litigation in the trial court. *See e.g.*, *Veliz v. Collins Bldg. Services, Inc.*, 2011 WL 4444498 (S.D.N.Y. 2011) (dismissing suit without prejudice because if the union prevented plaintiff from resolving his "statutory claims through the procedures set forth therein, the CBA will be unenforceable and Veliz will have the right to refile his claim in federal court.") (citing *Borrero v. Ruppert Hous. Co., Inc.*, 2009 WL 1748060 (S.D.N.Y. 2009) and *Kravar*, 2009 WL 1392595, at *3 (both dismissing without prejudice for that reason)).

Moreover, the CBA does not allow the grievances to go to arbitration without the union. CP 142-143, 206-207, 229-230. Therefore, Garda's willingness to arbitrate with each employee individually does not cure this deficiency. *Kravar*, 2009 WL 1392595 at *4 (employer's argument that it had notified employee of its willingness to arbitrate her ADA claim under the CBA, but employee had refused because that argument "confused the

issue. The arbitration provision that the Court must enforce is the one the union and the [employer] entered into, not a hypothetical agreement in which the employer's rather than the union's consent is critical.").[9]

C. SHOULD THE COURT HOLD THAT THE EMPLOYEES' CLAIMS ARE ACTIONABLE ONLY UNDER THE CBA, THE EMPLOYEES' CLAIMS MAY BE PURSUED IN A CLASS GRIEVANCE BECAUSE THEY ARISE UNDER FEDERAL LAW, SECTION 301 OF THE TAFT-HARTLEY ACT.

Should the Court nevertheless find that the Employees' right to bring their claims in court has been waived and that they could pursue their claims in arbitration without the union, those claims should be arbitrated by the class the trial court certified. The Court of Appeals erred in holding that under *Stolt-Nielson v. AnimalFeeds Int't Corp.*, 559 U.S. 662, 130 S. Ct. 1758, 176 L. Ed. 2d 605 (2010), the CBA's failure to mention class arbitration precluded class arbitration. If the Employees' claims are incorporated in the CBAs, those claims are governed by Section 301 of the Taft-Hartley Act, 29 USC 158, and governed by the federal common law developed under that statute. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 457 (1957). The FAA does not preempt the NLRA; rather, it

[9] *Cf.*, *Powell*, 457 F. App'x at 680 (no waiver because there was no explicit incorporation of statutory requirements and arbitration without the union was not contemplated under the CBA). The fact that Garda required its employees to "sign" the CBA does not change this. This direct dealing with employees was in derogation of the union's representative status under Section 9(a) and an unfair labor practice in violation of Section 8(1)(5) of the NLRA. *See J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944); *Pyett*, 556 U.S. at 248.

must be accommodated to the NLRA's purposes. *Cf., In re Am. Exp. Merchants' Litig.*, 667 F.3d 204, 212-17 (2d Cir. 2012) (majority opinion), and 681 F.3d 139 (2d Cir. 2012) (Pooler, J., concurring) (the teachings of *Concepcion* do not apply to determine the arbitrability of federal causes of action because the FAA does not preempt other federal statutes, but rather must be accommodated to them).[10] That accommodation is not difficult because while *Stolt-Nielson* held that under the Federal Arbitration Act (FAA) arbitration is a matter of consent, it was equally clear that custom and usage are relevant to determining the parties' intent. *Id.* at 1769 n. 6, 1770, 1775. Here it is uncontroverted that collective resolution of grievances through arbitration *is* the custom in labor disputes.

Similarly, Garda's reliance on *AT&T Mobility LLC v. Concepcion*, U.S. 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011), to contend that the undisputed custom of class arbitration in labor disputes "has no impact on what the parties agreed to in the case at hand," is misplaced. Ans. to Pet. at 17 (citing *Concepcion,* 131 S. Ct. at 1752, rejecting evidence of custom and usage because that argument flowed from usage that arose from *state*

[10] *See also, Orman v. Citigroup, Inc.*, 2012 WL 4039850 (S.D.N.Y. 2012) ("It is clear ... that the vindication of federal statutory rights doctrine remains the law of the Second Circuit not withstanding *Concepcion"); Fromer v. Comcast Corp.*, 886 F. Supp. 2d 106, 113-14 (D. Conn. 2012) (holding that FAA preempts state unconscionability doctrine as to state unfair trade practices act but not Second Circuit doctrine as to federal antitrust claim); *Raniere v. Citigroup Inc.*, 827 F. Supp. 2d 294, 310 (S.D.N.Y. 2011) (holding that *Concepcion* addressed only FAA's preemptive effect on state law and in no way abrogated *federal* arbitral law); *Chen-Oster* v. *Goldman,* 2011 WL 2671813 *3, n.2 (S.D.N.Y. 2011) ("the FAA may be subjugated to competing federal statutory rights").

common law requirements which were preempted by the FAA). As the Second Circuit observed, *Concepcion* held that "class arbitration, to the extent it is manufactured by ***state common law of unconscionability*** rather than consensual [agreement], is inconsistent with the FAA." *Merchants' Litig.*, 667 F.3d at 213 (emphasis added). Where, as here, the obligation to engage in class arbitration arises through a CBA and the federal common law interpreting consensual agreements between a union and an employer, not only is the FAA's concern for "consent" satisfied,[11] that concern must be accommodated to the body of common law under Section 301, which is "at the very heart of the system of industrial self-government." *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 581, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960).[12]

Arbitration of grievances that cover the entire bargaining unit, or all bargaining unit members affected by the alleged contract violation, are standard in labor arbitration, including arbitration of contractual parallels

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[11] Amicus Pacific Legal Foundation ("PLF") contends that the lack of consent by absent class members would violate their due process rights. That is an entirely misplaced argument in this context. If, as Garda contends, the union had the authority to waive the Employees' access to court in favor of arbitration under the CBAs, then the union's authority was sufficient to bring the employees into the normal process under the CBAs. Nor are PLF's concerns about the fairness of class certification under Civil Rule 23 pertinent here, where the union has representational status under Section 9(a) of the NLRA to proceed to arbitration for all its bargaining unit members.

[12] Garda's Supplemental Brief appears to abandon the mistaken argument made in its Answer to the Petition, contending that Employees' statutory claims are preempted under Section 301 because the CBA must be interpreted to adjudicate those claims. Of course, the claims are not preempted. *See Hume v. American Disposal*, 124 Wn.2d 656 (1994), *cert. denied*, 513 U.S. 1112 (1995).

to state laws.[13] Should the FAA not give way to this overriding purpose, the national labor policy would be subverted. This leads to but one conclusion—that the Employees have the right to pursue common grievances as a class is not forestalled by the FAA and is protected by the NLRA.[14] Therefore, if the Court holds the CBAs waive access to court and that the Employees are required to arbitrate even if the union refuses to arbitrate, they must be allowed to arbitrate as a class.

IV. CONCLUSION

Amici respectfully submit that this Court should remand for class litigation in the superior court.

RESPECTFULLY SUBMITTED this 22nd day of April, 2013.

Kathleen Phair Barnard
WSBA No. 17896

Jeffrey L. Needle
WSBA #3646

[13] *See e.g.* Grievance: Family Leave Benefits, AFA Case No. 36-99-02-49-03 (the negotiated ability to use paid time off to care for ill family members, a negotiated contractual right parallel to the Washington Family Care Act, must be apply to all bargaining unit members regardless of state of residence), a copy of which is appended to this brief.

[14] *See e.g.*, Elkouri & Elkouri, HOW ARBITRATION WORKS 212 (Alan Miles Rubin, 6th ed. 2003); *Eastex Inc.* v. *NLRB,* 437 U.S. 556, 566 (1978); *Brady v. National Football League,* 644 F.3d 661, 673 (8th Cir. 2011); *D.R Horton, Inc. v. Michael Cuda,* 357 *N.L.R.B* No. 184 (2012). Garda's contention that *D.R. Horton* is no longer good law because of decision in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013) is incorrect; the appeal of the NLRB's decision in *D.R .Horton* is pending in the 5th Circuit. Of course, if, as Employees and Amici here contend, there has been no waiver of the right to litigate, there also has been no waiver of the right under Section 7 of the NLRA, 29 U.S.C. § 157, to litigate as the class the trial court originally certified.

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of April, 2013, I caused the Motion of WELA, Washington State Labor Council and SEIU Local Unions, the Declaration of Kathleen Phair Barnard in Support of the Motion, and the Amici Curiae Brief to be served via email and First Class U.S. Mail to:

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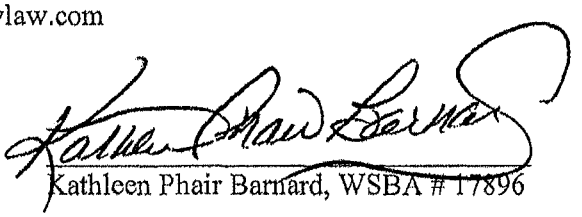


Kathleen Phair Barnard, WSBA # 17896

SUPREME COURT OF THE STATE OF WASHINGTON

LAWRENCE HILL, ADAM WISE, AND ROBERT MILLER, on behalf of themselves and all persons similarly situated, Plaintiffs/Appellants, v. GARDA CL NORTHWEST, INC., Defendant/Respondent.	No. 87877-3 **DECLARATION OF KATHLEEN PHAIR BARNARD IN SUPPORT OF MOTION OF WELA, STATE LABOR COUNCILAND SEIU LOCALS FOR LEAVE TO FILE AMICI CURIAE MEMORANDUM**

Kathleen Phair Barnard declares and states as follows based on her personal knowledge:

1. I am an attorney authorized to practice law in the State of Washington. I am the Chair of the Executive Board of Washington Employment Lawyers Association ("WELA") and am authorized by its Amicus Committee to bring this motion, and to submit the Amici Curiae Memorandum filed together with this motion. For the past 24 years, in addition to representing individual employees in employment cases, I have represented labor unions in all aspects of collective bargaining and litigation. I am authorized by the Washington State Labor Council, AFL-CIO ("State Labor Council") and the Service Employees International

Union Local 925, Local 6, Healthcare 775NW and Healthcare 1199NW ("SEIU Local Unions") to bring this motion, and to submit the Amici Curiae Memorandum filed together with this motion. I file this declaration in support of the Motion filed this date for leave to file an Amici Curiae Memorandum in the above referenced case.

2. WELA is a chapter of the National Employment Lawyers Association ("NELA"), a non-profit organization. WELA's approximately 143 members are Washington attorneys who primarily represent employees in employment law matters, including, *inter alia*, cases brought under the Washington Law Against Discrimination and wage and hours laws. One of WELA's principal goals is to advance the rights of employees against unlawful discrimination and to uphold the integrity of state and federal law protecting individual employment rights. WELA has appeared as amicus curiae in many cases before the Washington State Supreme Court involving statutory protections for employees and employees' rights to litigate and arbitrate their rights under those statutes.

3. The Washington State Labor Council, a state federation of the AFL-CIO, is a voluntary non-profit organization dedicated to protecting and strengthening the rights and conditions of working people and their

families. It is the largest and most prominent advocate for the interests of working people in the state of Washington. It represents approximately 550 local and statewide unions associated with the AFL-CIO, which in turn represent approximately 450,000 members.

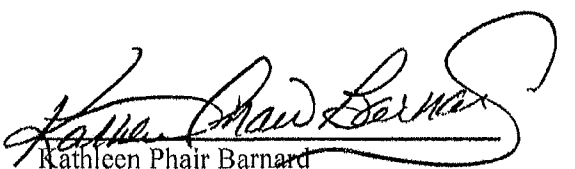
4. The SEIU Local Unions represent and advocate for almost 100,000 members in the fields of health care, long-term care, childcare, public services, education, and property services. SEIU Local 925 represents 23,000 members in education, local government and non-profit organizations. SEIU Local 6 represents over 4,000 janitors and security officers. SEIU Healthcare 775NW is an organization of over 45,000 long-term care workers who care for the state's most vulnerable elderly and disabled residents and who have joined together to have a stronger voice for quality care, living wages and good benefits. SEIU HealthCare 119NW is made up of 24,000 nurses, health care employees and mental health workers.

5. I have reviewed the briefs filed in this Court by the parties and proposed amici. The brief WELA, the State Labor Council and the SEIU locals seek to file delineates developments in the federal law concerning clear and unmistakable waivers of statutory rights in collective bargaining agreements since the decision in *Brundridge v. Fluor Fed. Services Inc.*,

109 Wn. App. 347, 355-56, (2001), and the interplay of Section 301 of the Taft-Hartley Act, 29 U.S.C. § 158 and the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*, and provides analysis which should assist the Court on review..

I declare under penalty of perjury under the laws of the State of Washington that the foregoing statements are true and correct.

SIGNED at Seattle, Washington, this 22nd day of April, 2013.



Kathleen Phair Barnard
WSBA # 17986

No. 87877-3

SUPREME COURT
OF THE STATE OF WASHINGTON

LAWRENCE HILL, ADAM WISE, AND ROBERT MILLER,
on behalf of themselves and all persons similarly situated,

Petitioners,

v.

GARDA CL NORTHWEST, INC.,

Respondent.

APPENDIX

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On Behalf Of
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Washington State Labor Council
Service Employees International Union Local 925, Local 6,
Healthcare 775NW, Healthcare'1199NW

Attorneys for Amici Curiae

ALASKA AIRLINES FLIGHT ATTENDANT SYSTEM BOARD OF ADJUSTMENT

In the Matter of the Arbitration Between ALASKA AIRLINES, INC. And ASSOCIATION OF FLIGHT ATTENDANTS Grievance: Family Leave Benefits AFA Case No. 36-99-02-49-03	FINDINGS AND AWARD

This proceeding before the Alaska Airlines Flight Attendants System Board of Adjustment is conducted pursuant to the provisions of Section 20 of a collective bargaining agreement that became effective October 19, 1999. The parties to the said agreement are the Association of Flight Attendants (referred to here as the "Association") and Alaska Airlines, Inc. (designated here as the "Company"). The Company and Association concur that the matter in dispute is properly before the present System Board of Adjustment composed of Mr. Bob

Hudson and Ms. Lori D. Manning (appointed by the Company), Ms. Rene Celestine and Ms. Gail L. Bigelow (appointed by the Association) along with Thomas T. Roberts, selected by the parties to serve in the capacity of Chairman.

THE HEARING BEFORE THE SYSTEM BOARD OF ADJUSTMENT

The matter here at issue was heard before the System Board of Adjustment at Seattle, Washington on October 13, 2004. Throughout the course of the hearing both parties were afforded full opportunity to present sworn testimony, cross-examine witnesses and introduce documentary evidence. Thereafter, a verbatim transcript of the proceeding was prepared and written argument submitted in the form of post-hearing briefs. Finally, the System Board of Adjustment met in Executive Session at Los Angeles, California on February 7, 2005.

THE APPEARANCES OF COUNSEL

The appearance on behalf of the Company was made by Mr. Geoffrey M. Boodell of Sebris Busto James, Attorneys at Law. The Association of Flight Attendants was represented in the person of Mr. Mark B. Bigelow, Associate General Counsel.

THE MATTERS AT ISSUE

The parties were unable to mutually construct a statement of the issues to be here adjudicated. Accordingly, the Chairman of the System Board of Adjustment was authorized to incorporate herein a statement of the issues and that statement is as follows:

1. "Did the Company violate the collective bargaining agreement or past practice when it expanded family leave benefits to match applicable Washington State law for only those flight attendants domiciled at Seattle?

2. If so, what shall be the remedy?"

FINDINGS OF FACT

The Washington State Legislature adopted Administrative Code Chapter 296-130 (entitled "Family Care Act") effective August 31, 1988. That statute established in the State of Washington "a minimum standard allowing an employee to use the employee's accrued leave to care for a child of the employee". A "child of the employee" was therein defined as a natural offspring of the employee or the employee's spouse, an adopted child or a child under legal guardianship, custody or foster care. At the time, Alaska Airlines did not expand the applicability of its then existing sick leave policy (limited in its benefits solely to employees)

so as to permit the use of accrued benefits for the care of a child under the age of eighteen.

On March 22, 1994, representatives of the Company and the Association executed a written agreement setting forth the attendance policy applicable to Alaska Airlines flight attendants, an undertaking designated as "Side Letter 2". In principle part, Side Letter 2 in its terms followed the structure of the attendance policy previously negotiated by the Association at Southwest Airlines. Side Letter 2 thereafter was incorporated as a provision of the collective bargaining agreement between Alaska Airlines and the Association of Flight Attendants.

In an interoffice correspondence dated January 2, 1998, the Company announced changes in its existing sick leave policy "for employees in all work groups". One such change, made effective immediately, extended the use of accrued sick leave to the care of a sick child under the age of eighteen when that child requires medication that cannot be self-administered or experiences a condition which endangers the child's safety or recovery in the absence of supervision of a parent. That sick leave policy change was made applicable to all employees systemwide. At the same time, "Employees who work in Oregon" were additionally permitted the use of accrued sick leave for the care of an infant or newly adopted or foster child for up to twelve weeks within any one-year period.

One week later, on January 9, 1998, Inflight Services issued a Flight Attendant Bulletin confirming that flight attendants may use sick leave during absences to care for their children under prescribed conditions but with the limitation that only one doctor's statement confirming the health condition of a child may be used per quarter to reduce points for a qualifying absence. The Association thereafter filed Grievance No. 36-19-2-150-02 challenging the decision of the Company to accept but one doctor's statement per quarter relative to the child or children of a flight attendant and seeking expansion of that benefit to include the acceptance of one sick note per quarter for each minor child.

The State of Washington legislature revised the "Family Care Act" effective January 1, 2003 with the adoption of RCW 49.12.265 (thereafter made a part of Washington Administrative Code 296-130-010) wherein a minimum standard allowing employees to use sick leave or other paid time off to care for a sick family member is established. That action expanded the reach of such benefits beyond a child to grandparents, parents, parents-in-law and spouses. An "employee" is therein defined as "a worker who is employed in the business of an employer". Also effective January 1, 2003, the State of California similarly expanded its statutorily imposed family leave benefits.

The Company documented its response to the expanded family leave benefits mandated by the changes in the Washington and

California statutes on January 14, 2003 in a communication to supervision authored by Manager of Health Benefits Linda Luse. That communication stated that effective immediately significant changes were being made in the sick leave policy of the Company "for employees working in Washington State and California" with the proviso that "we will be posting the required state-specific Sick Leave notices on employee bulletin boards at our various work locations in the states of Washington and California". As to "employees working in Washington", family sick leave benefits were made applicable not only for care of a child but also care of a spouse, domestic partner, parent, parent-in-law and grandparents. The notice stated, "We are implementing this expanded definition of family member . . . only for those employees working in Washington State. We are **not** implementing this expanded definition for employees elsewhere in our system". For employees working in California, accrued sick leave benefits were concurrently extended to a child, parent, spouse or domestic partner but not to parents-in-law or grandparents.

Also on January 14, 2003, a Flight Attendant Bulletin was posted setting forth the foregoing changes to the sick leave policy of the Company "for employees working in the states of Washington and California", an announcement accompanied by the statement, "We are **not** implementing this expanded definition for employees elsewhere in our system".

A revised statement of the changes in the family leave benefits applicable to flight attendants was posted on January 20, 2003. The bulletin of that date repeated that the benefit changes afforded as a consequence of the expanded definition of family member were only applicable to employees working in the state of Washington and not elsewhere in the Alaska Airlines system except for employees working in California who could take advantage of a definition of "family member" that was expanded but "not quite as broad as Washington's new law".

On February 27, 2003, the Association filed the grievance that here brings the parties before the System Board of Adjustment. The grievance charges management with a violation of Side Letter 2 and an existing past practice by not expanding the enhanced provisions of the State of Washington family leave act to flight attendants assigned to domiciles other than Seattle. The Company denied the grievance on March 11, 2003 stating in part, "When state law requires the Company to recognize more circumstances where a flight attendant must be allowed to use accrued sick leave than permitted under the collective bargaining agreement, the Company complies with state laws as to the employees based in that state. It has no practice or policy extending the legal requirements of one state to flight attendants not based in that state". The Association thereafter appealed the grievance to the System Board of Adjustment on April 3, 2003.

It is to be finally noted that the Company and the Association entered into a settlement of Grievance No. 36-19-2-150-02 relating to the permissible number of doctors sick leave notes permitted per quarter under Side Letter 2 for one per minor child. That grievance settlement was made applicable to all flight attendants systemwide.

RELEVANT CONTRACTUAL PROVISIONS

SIDE LETTER 2

ATTENDANCE POLICY

The Attendance Policy for Alaska Airlines Flight Attendants shall be as follows:

1. REPORTING PROCEDURE

In all cases of absence, a Flight Attendant will be required to call the designated Company representative . . .

3. DEFINITIONS

c. Reported Illness: When a Flight Attendant calls prior to two (2) hours of scheduled departure to report that s/he will not report to work because of his/her personal illness/injury. (Limited to one continuous occurrence of illness per calendar quarter, and must be supported by a doctor's statement).

d. Reported Illness: (no doctor's statement or after utilizing one (1) doctor's statement in the quarter). When a Flight Attendant calls prior to two (2) hours of scheduled departure to report that s/he will not report to work because of his/her personal illness/injury, and does not provide a doctor's statement

or has already utilized a doctor's statement in the same calendar quarter.

e. Reported Illness Within Two (2) Hours of Scheduled Flight Departure: When a Flight Attendant calls in sick less than two (2) hours prior to scheduled flight departure.

5. CONTROL PROCEDURE

Absences as described above will be recorded in the following manner . . .

ADDENDUM TO
SIDE LETTER 2

ATTENDANCE

GENERAL INFORMATION

1. **When can I use sick leave?**
Sick leave may be used for:
1. disabling illness or injury.
2. covering the difference between Worker's Compensation and straight-time hours.
3. death in the immediate family.
4. maternity leave.
5. FMLA for your illness or injury.
6. and pursuant to applicable State law and/or Company policy, your child under the age of 18 with a health condition that requires medication that cannot be self-administered or a health condition that endangers the child's safety or recovery without a parent's supervision.

16. **Will I accrue attendance points when I call in sick for my child and can I use a Doctor's Statement to reduce points?**
Pursuant to Company policy, attendance points for an absence called in for a sick child is handled as follows: you will receive one half (.5) point per day for each day you are absent up to a 2.5 maximum for a Single Continuous Occurrence. You may use one

Doctor's Statement for a sick child per quarter in addition to the one Doctor's Statement used to reduce points for your own illness or injury. The Doctor's Statement must contain the following to be deemed acceptable:

1. Date(s) of the child's illness/injury
2. Date(s) of treatment
3. Diagnosis
4. Child's name and age
5. Doctor's signature
6. The Statement must be written on a form stamped or printed with the Doctor's name, address and phone number.

THE CONTENTIONS OF THE PARTIES

The Association points out that Side Letter 2 sets forth the attendance policy applicable to flight attendants as agreed to by both the Company and the Association. It notes that when the Family Care Act was thereafter adopted by the State of Washington, the coverage of the sick leave policy was expanded to include the care of a child without changing the agreed upon language of Side Letter 2 and the expanded coverage was concurrently made applicable to all flight attendants systemwide. It is said that in this the Company and the Association agreed their collective bargaining agreement incorporated the terms of the State of Washington Family Care Act and as a consequence the provisions of that legislation, as thereafter amended, must be applied equally to all members of the bargaining unit in the absence of a specific modification

negotiated by the parties. The Association further insists that if the just cause standard of the labor contract is to be honored, discipline that attaches to attendance deficiencies of flight attendants must be applied consistently whatever the domicile of the individual flight attendant may be. Finally, the Association charges the Company with a violation of an existing past practice that saw the flight attendant attendance policy at the time it was negotiated made applicable in all of its terms to all flight attendants whatever their domicile. It is contended that for all of these reasons, the present grievance must be sustained along with a finding that the Company is obligated to apply the attendance policy uniformly throughout the bargaining unit.

The Company responds by stating the decision of management to unilaterally expand sick leave coverage beyond only the employee so as to also include illness of a child under the age of eighteen made concurrently with the expansion of the coverage of the Washington Family Leave Act was founded upon competitive reasons and as a matter of fairness. It is noted that although that revision of the sick leave policy was made effective for all employees systemwide, flight attendants domiciled at Portland were additionally made eligible for paid parental leave for newborn or newly adopted children. The Company insists the collective bargaining agreement imposes no obligation upon management to administer the Washington Family Leave Act or the attendance policy incorporated in Side Letter 2 of the collective bargaining agreement in any

manner other than that currently in place. Management contends the parties never intended to apply the Washington Family Leave Act to all flight attendants in whatever their circumstance and, indeed, if such was their intent they could have negotiated language to that effect, language not present in the collective bargaining agreement. The Company additionally denies the existence of a past practice of extending statutory family leave provisions existing in one state to flight attendants domiciled in other states. The Company thus requests that the System Board of Adjustment deny the grievance here advanced by the Association.

DISCUSSION BY THE CHAIRMAN

The attendance policy applicable to flight attendants at Alaska Airlines was collectively bargained by the Company and the Association as a no-fault program imposing penalty points which in their totality at any point in time identify progressive degrees of discipline. As originally negotiated, the attendance policy was applicable in its terms to all flight attendants whatever the location of their domicile. It occurred, however, that in subsequent years certain of the states wherein flight attendants were domiciled statutorily expanded required earned leave benefits to include the care of a child and other family members. The Company unilaterally adjusted the flight attendants leave policy to match

the initial expansion of the State of Washington Family Leave Act to include care for the child of an employee.

The Association argues that this expansion of the sick leave policy at Alaska Airlines accomplished in January of 1998 to permit the use of accrued lick leave to care for a sick child constituted a negotiated change in the policy as it relates to flight attendants. The record made before the System Board of Adjustment does not support that contention. The changes in the then existing sick leave policy announced by the Company on January 2, 1998 were placed into effect unilaterally by management. The Association did not object to the change since it benefited the membership but the change was not the product of negotiations. What the parties did negotiate was a declaration in the "Addendum to Side Letter 2" that states that pursuant to Company policy sick leave may be used for care of a child under the age of eighteen.

The Addendum to Side Letter 2 also refers to "applicable State law". The Company interprets that clause to permit differing sick leave benefit eligibility requirements to match the benefits awarded by the state law applicable at the domicile of the individual flight attendant. The Addendum to Side Letter 2 does not, however, set forth a negotiated understanding that employees within the bargaining unit represented by the Association will be afforded differing sick leave benefits determined by the location of their domicile. All that the reference to applicable state law appearing therein can be read to mean is

that child care benefits awarded under Company policy must comply with applicable state law. The award of child care benefits instituted by the Company in January of 1998 did comply with that constraint.

The Company is additionally correct when it points out that Side Letter 2 is silent regarding any obligation of management to provide sick leave coverage for the illness of anyone other than an employee or a child of an employee. Nothing is spelled out therein extending such coverage to a parent, grandparent or domestic partner. That is not to say, however, that management is free to provide differing sick leave benefits to members of the bargaining unit with such benefits determined solely by the location of their domicile. The attendance policy set forth in Side Letter 2 is equally a component of the collective bargaining agreement as are the just cause concepts appearing elsewhere therein.

Flight attendant bargaining unit members are hired in the State of Washington, initially trained in Washington and receive their recurrent training in Washington. They work out of a domicile (presently either Seattle, Los Angeles, Anchorage or Portland) but fly sequences that find them performing their duties in other states, Mexico and Canada. Further, not every flight attendant resides in the state of their domicile. It must additionally be recognized that all of the terms of the collective bargaining agreement other than family sick leave benefits are available

equally in their application to all flight attendants whatever may be their domicile.

Even more directly to the point, the attendance policy set forth in Side Letter 2, a component of the collective bargaining agreement, assigns points for chargeable occurrences of absences associated with illness and the accumulation of such points may result in the imposition of disciplinary action up to and including termination. The very concept of just cause precludes a disparate vulnerability to discipline as a consequence of a sick leave benefit policy that would bring with it a different disciplinary scale determined solely by the then current domicile of a bargaining unit member.

If the Company desires a different sick leave benefit program at individual domiciles so as to comply with local legislation it must bargain those differences with the Association. Neither the Company nor the Association is free to unilaterally apply the collective bargaining agreement in a different manner to individual members of the flight attendant bargaining unit. In the present case, the Company has not secured such bargained differences. The application of unequal sick leave family benefit coverage fixed solely by reason of the domicile of a bargaining unit member has not been negotiated. The grievance protesting that result and here before the System Board of Adjustment is therefore sustained.

AWARD OF THE SYSTEM BOARD OF ADJUSTMENT

1. All members of the flight attendant bargaining unit are entitled to the total of the sick leave benefits currently provided to those flight attendants domiciled in either the State of Washington or California.

2. The Company has violated Side Letter 2 in not providing such benefits to all flight attendants

3. The Company shall forthwith apply to all flight attendants the family sick leave benefits currently provided those flight attendants domiciled at Seattle and Los Angeles.

Dated: April 20, 2005

THOMAS T. ROBERTS, Chairman

05/10/2005

BOB HUDSON (I Dissent)

GAYLE L. BIGELOW (I Concur)

5/10/05

LORI D. MANNING (I Dissent)

RENE CELESTIN (I Concur)

OFFICE RECEPTIONIST, CLERK

To: Carrie Fassler
Cc: Kathy Barnard; Danielle Franco-Malone; Jude Bryan
Subject: RE: Filing in WA Supreme Court Case No. 87877-3

Rec'd 4-22-13

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Carrie Fassler [mailto:fassler@workerlaw.com]
Sent: Monday, April 22, 2013 4:44 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Kathy Barnard; Danielle Franco-Malone; Jude Bryan
Subject: Filing in WA Supreme Court Case No. 87877-3

Good Afternoon,

Attached please find the Motion of WELA, State Labor Council and SEIU Locals for Leave to File Amici Curiae Memorandum, the Declaration of Kathleen Phair Barnard, a Brief of Amici Curiae, and an Appendix for filing in *Hill et al. v. Garda CL Northwest, Inc.*, Case No. 87877-3. If you have any trouble opening the documents please let me know.

Sincerely,

Carrie Fassler
Filing on behalf of:
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Schwerin Campbell Barnard Iglitzin & Lavitt LLP
18 West Mercer Street, Ste. 400
Seattle, WA 98119-3971
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