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NO. 89723-9

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

BF FOODS, LLC, FILO FOODS, LLC, ALASKA AIRLINES, INC., and
WASHINGTON RESTAURANT ASSOCIATION,
Respondents/Cross-Appellants,

v.

CITY OF SEATAC, KRISTINA GREGG, CITY OF SEATAC CLERK,
Appellants/Cross-Respondents,

and the

PORT OF SEATTLE,
Respondent,

and

SEATAC COMMITTEE FOR GOOD JOBS,
Appellants/Cross-Respondent.

**ANSWER OF APPELLANT/CROSS-RESPONDENT SEATAC
COMMITTEE FOR GOOD JOBS TO *AMICUS CURIAE* BRIEF OF
ASSOCIATION OF WASHINGTON BUSINESS**

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ORIGINAL

I. ARGUMENT

A. Introduction.

The amicus brief filed by the Association of Washington Business (“AWB”) adds nothing of value to the arguments made to this Court by the Respondents/Cross-Appellants in support of their contention that one or more portions of SeaTac Municipal Code (“SMC”), Ch. 7.45 (“the Ordinance”) are preempted by the National Labor Relations Act, 29 U.S.C. §§ 151-169 (“NLRA”) – arguments that the SeaTac Committee for Good Jobs (“Committee”) addressed and refuted in its Brief of Appellant, at pages 43-50, and in the Reply Brief and Cross-Response Brief of Appellant at pages 18-19 and 40-52. AWB’s contentions should be rejected as being wholly unsupported by, where not overtly contravening, settled labor law.

B. **The AWB’s Contention Regarding *Garmon* Preemption Fails To Address Either The Caselaw Or The Analysis Set Forth In The SeaTac Committee For Good Job’s Opening and Reply Briefs On This Issue.**

AWB makes the conclusory assertion that “the trial court properly found that section .090 of the Ordinance is preempted under *Garmon* [*San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959)] insofar as it prohibits employer conduct (retaliation for an exercise of rights) already prohibited as an unfair labor practice by

section 8 of the NLRA.” See Brief of Amicus Curiae Association of Washington Business (“AWB Brief”) at 8.

In so asserting, AWB failed to even mention, much less respond to, the caselaw and analysis set forth by the Committee in its Brief of Appellant, at pages 43-50, and in the Reply Brief and Cross-Response Brief of Appellant, at pages 18-19. AWB has therefore contributed nothing to the discussion of this portion of the Committee’s appeal beyond the arguments previously made by the Plaintiffs in this action at pages 17-18 in their Amended Answering Brief and Opening Cross-Appeal Brief, arguments that were rebutted by the Committee in its Reply Brief and Cross-Response Brief.

For this reason, no further discussion of AWB’s *Garmon* preemption argument is necessary here.

C. AWB’s *Machinists* Preemption Analysis Has No Merit.

AWB implicitly concedes that “minimum labor standards” imposed by state law are not preempted by the NLRA. See AWB Brief at 9 (citing *Metropolitan Life Ins. Co. v Travelers Ins. Co.*, 471 U.S. 724, 105 S. Ct. 2380, 85 L. Ed. 2d 728 (1985)). To try to get around this bedrock legal principle, AWB argues that the Ordinance “imposes a complex, collective bargaining agreement-like set of substantive restrictions and regulations on targeted employers” that goes far beyond such “minimum labor standards.” *Id.* AWB’s argument is wrong on both the facts and the law.

First, although AWB attempts to characterize the provisions of the Ordinance as being something other than minimum labor standards, it cites no legal authority in support. That is not surprising, because there **is** in fact **no legal authority** suggesting that any or all of the four provisions of the Ordinance that AWB complains of in its brief – requiring employers (1) to provide part-time workers with certain additional hours of work if available, (2) to allow their workers to retain or receive the tips and service charges received from or imposed on customers, (3) to hire and/or retain for a limited period of time certain workers who were employed by a predecessor employer, and/or (4) to keep and make available pertinent records regarding their employment practices (*see* AWB Brief, pp. 9-10) – in fact fall outside of the broad scope of non-preempted minimum labor standards.

The specific arguments made by AWB in support of its broad assertions regarding each of these provisions are equally flawed.

First, AWB asserts that “the requirement that a part-time employee be offered additional hours of work before an employer utilize subcontractors (as required by SeaTac Mun. Code § 7.45.030) erodes core entrepreneurial issues as to how an employer structures its business,” citing *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 686, 101 S. Ct. 2573, 69 L. Ed. 2d 318 (1981). AWB Brief at 11. But that decision dealt only with the question of what types of decisions are “mandatory

subjects of bargaining” regarding which an employer is obligated to negotiate with a union under Section 8(d) of the NLRA, not what types of decisions do or do not constitute “minimum labor standards” that may legitimately be the subject of state or local regulation within the Supreme Court’s *Machinists*¹ preemption doctrine.

Additionally, the decision in *First National Maintenance Corp.* dealt exclusively with an employer’s decision “to shut down part of its business for economic reasons,” not with state or local regulation of an employer’s potential decision regarding how many hours of work should be offered to employees and under what circumstances such hours should be offered.²

Second AWB asserts that “SeaTac Mun. Code § 7.45.040 creates no standards as to employees at all, but instead merely picks ‘winners’ and ‘losers’ among an employers’ employees.” AWB Brief at 11. This is transparently false. SMC § 7.45.040(A) gives covered workers the right to retain their tips and receive the service charges imposed by their employer

¹ See *Machinists Lodge 76, Int’l Ass’n of Machinists v. Wisconsin Empl. Rel. Comm’n*, 427 U.S. 132, 147, 96 S.Ct. 2548, 49 L.Ed.2d 396 (1976).

² In fact, the Court in *First National Maintenance Corp.* made a point of noting that in its opinion, it was “of course intimat[ing] no view as to other types of management decisions, such as plant relocations, sales, **other kinds of subcontracting**, automation, etc., which are to be considered on their particular facts.” 452 U.S. at 686 n. 22. (emphasis added).

on their customers. This is just as much a minimum labor standard as is a minimum hourly wage, and AWB cites no authority to the contrary.³

Third, AWB asserts that “the ‘retention employee’ scheme of § 7.45.060, complete with its seniority lists and strict limitations on the hiring prerogatives of a new business, read [sic] like provisions straight out of a union collective bargaining agreement....” AWB Brief at 11. Yet minimum hourly wages and paid sick time are employment conditions commonly provided for in union contracts, but these minimum labor standards are clearly not *Machinists* preempted. AWB cites no legal authority for the proposition that a “resemblance” between a state or local regulation and language that might hypothetically be found in a collective bargaining agreement provides a legal basis for concluding that the state or local regulation is preempted.⁴

³ The requirement in SMC § 7.45.040(B) that the amounts received from tips or service charges “shall be allocated among the workers who performed these services equitably” is certainly important, but it enhances, and does not detract from, the fact that the intent and operation of this law is to make sure that all covered workers benefit directly from tips and service charges. This is not currently mandated by state law, which requires only that employers disclose to customers the amount of any service charge they impose that is paid to the employees who serve the customer. *See* RCW 49.46.160(1).

⁴ AWB also makes no attempt to address or distinguish *Rhode Island Hospitality Ass'n v. City of Providence*, 667 F.3d 17, 23-40 (1st Cir. 2011), *California Grocers Ass'n v. City of Los Angeles*, 52 Cal.4th 177, 254 P.3d 1019, 1035-1036 (Cal. 2011) and *Washington Service Contractors Coalition v. District of Columbia*, 54 F.3d 811, 818 (D.C. Cir. 1995), all of which upheld against an identical *Machinists* preemption challenge “worker retention” laws identical in all material respects to that contained in the SeaTac Ordinance. *See generally* Brief of Appellant, at pages 47-49.

AWB also contends that the Ordinance “cannot survive *Machinists* preemption because of SeaTac Mun. Code § 7.45.080, which by its terms bars employers from utilizing ‘economic weapons’ specifically allowed them under federal law.” AWB Brief at 12. The plain language of that provision, however, does not preclude employers from utilizing any “economic weapon,” such as implementing a lockout or unilaterally implementing lawful changes to existing terms and conditions of employment after bargaining to a good faith impasse, to the extent that might otherwise be permitted by the NLRA.⁵ Instead, SMC § 7.45.080 simply limits the applicability of the “collective bargaining opt-out” or “waiver” provision of the Ordinance to situations where a waiver is contractually agreed to between an employer and the exclusive bargaining representative of its employees. For reasons set forth in the Brief of Appellant at pages 44-47, such “opt-out” provisions have been repeatedly held to be lawful and not preempted by the NLRA, including by the United States Supreme Court in *Livadas v. Bradshaw*, 512 U.S. 107, 131-

⁵ For this reason, the sole case cited by AWB in support of its argument, *Electrical Workers, Local 111 v. Colorado-Ute Elec. Ass’n*, 939 F.2d 1392, 1404 (10th Cir. 1991), cert. denied 504 U.S. 955 (1992), is wholly inapposite. Moreover, that decision held only that Section 8(a)(5) of the NLRA is not violated by an employer’s decision to unilaterally implement changes after reaching good-faith impasse. It did not hold that a state or local regulation that restricts the implementation of certain changes is necessarily *Machinists* preempted. Nor is this the law. An employer might lawfully be entitled to propose (in bargaining) to reduce the pay of its unionized workers to something less than what is required by RCW 49.46, Washington State’s Minimum Wage Act, but the NLRA certainly gives that employer no right to unilaterally implement such a change in violation of state law.

132 & n.26, 114 S.Ct. 2068, 129 L. Ed. 2d 93 (1994) and *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 22, 107 S.Ct. 2211, 96 L.Ed.2d 1 (1987).

II. CONCLUSION

That some of the improved working conditions that are mandated by city law and therefore are currently in place within the City of SeaTac might potentially resemble certain benefits that unions could seek to obtain for their members is legally irrelevant to the inquiry before this Court, which is whether the Ordinance is preempted by federal law on the basis that it impairs “the processes of bargaining or self-organization.” *Metropolitan Life Ins. Co.*, 471 U.S. at 756. Because the Ordinance in no way impairs the bargaining process, but merely raises the floor that functions as the “backdrop” for negotiations, see *Fort Halifax Packing Co.*, 482 U.S. at 21, the Ordinance is in no way preempted by the *Machinists* doctrine and the trial court’s ruling on that issue should be affirmed. See also Brief of Appellant, pages 40-44.

Respectfully submitted this 5th day of June, 2014.



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DECLARATION OF SERVICE

I, Jennifer Woodward, declare under penalty of perjury under the laws of the State of Washington that on June 5, 2014, I caused the foregoing Answer of Appellant/Cross-Respondent SeaTac Committee for Good Jobs to Amicus Curiae Brief of Association of Washington Business to be filed via email with the Clerk of the Supreme Court, and a true and correct copy of the same to be delivered via email, and placed in the US First Class mail, per agreement of counsel, to:

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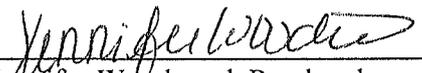
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Subject: Case No. 89723-9, BF Foods et al v. City of SeaTac - Appellant/Cross-Respondent Committee's Answers to Amicus Briefs

Good Afternoon,

Attached for filing in Case No. 89723-9 (BF Foods et al v. City of SeaTac), on behalf of Appellant/Cross-Respondent SeaTac Committee For Good Jobs, are the following:

1. Committee's Answer To Amicus Curiae Brief Of Airlines For America
2. Committee's Answer To Amicus Curiae Brief Of Association Of Washington Business
3. Committee's Answer To Amicus Curiae Brief Of Masterpark LLC
4. Committee's Answer To Amicus Curiae Brief Of Washington Public Ports Association

Please let me know if you have any difficulty with the attachments.

Sincerely,

Jennifer Woodward

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