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SUPREME COURT OF THE STATE OF WASHINGTON

ASSOCIATED GENERAL CONTRACTORS OF
WASHINGTON; ASSOCIATED BUILDERS AND
CONTRACTORS OF WASHINGTON; INLAND PACIFIC
CHAPTER OF ASSOCIATED BUILDERS AND
CONTRACTORS, INC.; and INLAND NORTHWEST AGC,

Respondents,

v.

STATE OF WASHINGTON, JAY INSLEE, JOEL SACKS,
and JIM CHRISTENSEN,

Petitioners.

BRIEF OF *AMICUS CURIAE*

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IDENTITY AND INTEREST OF AMICUS CURIAE

Local 302 is labor organization representing over 14,000 members in Washington, Idaho, and Alaska. Local 302 is signatory with approximately 200 contractors engaged in the construction industry within the State of Washington.

Local 302 is committed to serving the interests of its members and their families through the collective bargaining process, legislative actions, and extensive training and skills improvement programs. Local 302, in cooperation with other labor organizations and trade councils, engages in advocacy at all levels of government with the mission of protecting and promoting the interests of its membership within the labor community.

In its advocacy role, Local 302 was a participant in the drafting and passage of Substitute Senate Bill 5493 (“SSB 5493”). Accordingly, Local 302 has expertise with the issues and a strong interest in being heard regarding the constitutionality of the legislation it helped to craft.

Additionally, as a signatory to multiple Master Labor Agreements within the State of Washington, including with

Respondent Associated General Contractors of Washington (“AGC”), Local 302 has a further interest in protecting both the beneficiaries of those agreements and the integrity of the collective bargaining process. The Respondents’ challenge to SSB 5493 has the potential to directly impact Local 302’s membership at large. Local 302, therefore, has a vital interest in proper review of this matter.

STATEMENT OF THE ISSUES

1. Whether the record supports the Court of Appeals’ concern that SSB 5493 has resulted in misuse or abuse by private parties.
2. Whether the record supports the Court of Appeals’ ruling that SSB 5493 lacks procedural safeguards.

STATEMENT OF THE CASE

Local 302 participates in collective bargaining with all its signatory employers, including approximately 40 contractors who assign limited bargaining rights to the AGC.

The AGC is an employer association that represents both union and non-union construction contractors. Typically, member contractors of such associations bargain collectively and

are bound, from the moment negotiations commence, to the outcome of the association's negotiations with a labor union. The AGC does not engage in this type of bargaining.

AGC contractor members negotiate on a "single employer" basis. None of the AGC contractors join a multi-employer bargaining group and each contractor can abandon the bargaining process at any time, even after the AGC reaches agreement.¹ CP 1934, 2068. The only specific rights that AGC members assign to the AGC is the right to terminate and accept an AGC contract. *Id.*

In 2018, Local 302 commenced bargaining for construction industry master labor agreements by first meeting with the non-AGC Northwest Crane Owners Association ("NWCOA"). CP 1928, ¶9. The NWCOA was formed by 9 crane rental companies in 2016, each of whom had previously been AGC members. CP 2071, ¶4. Each contractor assigned its

¹ Respondent AGC asserts that it "represents members in multi-employer collective bargaining negotiations with unions." CP 2293, ¶8. This statement is misleading. The AGC explicitly informs Local 302 that its members who have assigned their bargaining rights "will not be bound by the outcome of any negotiations...and reserve the sole authority to accept or reject any bargained single employer agreement". CP 1934.

exclusive bargaining rights to the NWCOA. CP 2072, ¶5. Once bargaining commenced, all were legally bound to the outcome of negotiations. Id.

Local 302 met and bargained with the NWCOA on April 10, May 15 and 31, July 13, and September 5. CP 2072, ¶6. A tentative agreement was reached on September 5 and ratified the following day. CP 2072, ¶7.

On March 19, 2018, the AGC sent a pre-bargaining letter to Local 302 terminating the collective bargaining agreement on behalf of 45 contractors and requesting to meet and bargain a successor contract. CP 1934. By the terms of the letter, not a single contractor listed was bound to the outcome of the upcoming negotiations between the AGC and Local 302. Id., fn. 1, *supra*.

Local 302 commenced bargaining with the AGC on May 14, 2018. CP 1928, ¶8. Ultimately, Local 302 membership voted down contract proposals on July 25 and August 20. Id. Local 302 called a strike against the AGC on August 21. Id.

Once the strike commenced, the AGC informed Local 302 that it was going to “stonewall” negotiations and force the

affected membership to revoke an earlier proposal. CP 1929, ¶11. Shortly thereafter, multiple contractors approached Local 302 and initiated discussions for a successor agreement. CP 1929, ¶12. The negotiations that followed resulted in an economic proposal that was slightly above the AGC's last offer. *Id.* Local 302 reduced the agreement to writing and it became the Master Labor Agreement of Western Washington ("MLAWW"). CP 1929, ¶13.

During September and into October 2018, approximately 51 contractors signed the MLAWW. CP 1930, ¶15. *Id.* The economic terms of the NWCOA and the MLAWW agreements were identical. *Id.*

On September 6, the AGC increased its economic offer, resulting in a tentative agreement. CP 1930, ¶16. The agreement was ratified on September 28. *Id.* None of the AGC contractors were legally bound to accept the agreement. CP 1934, 2068. On November 21, the AGC sent Local 302 a letter with authorization from 41 contractors to accept the contract. CP 2068. At that time, Local 302 had 47 contractors signed to the MLAWW (CP

2530-31) and 9 contractors signed to the multi-employer NWCOA agreement. CP 2071, 2117.

During negotiations for the MLAWW and NWCOA contracts, Local 302 introduced the concept of a tiered wage rate for rural counties. CP 1932, ¶19. The purpose of negotiating a lower rate in less populated counties was to reflect local market forces more accurately in the collective bargaining process. *Id.* Only after Local 302 bargained the lower rural rates within the MLAWW and NWCOA contracts did the AGC agree to the same approach in its contract. *Id.*

On March 3, 2019, the Department of Labor and Industries prevailed the wage package of the MLAWW/ NWCOA contracts over the slightly lower AGC wage package.² CP 1931, ¶18.

AGC eventually sued to stop the prevailing wage rate from applying, resulting in the current action. Throughout the proceeding, AGC has used the Local 302 contract as an example of collusion.

² See discussion in Section A (3), *infra*.

ARGUMENT

The Court of Appeals reversed the Superior Court's order related to the 2018 master labor agreement negotiations between Local 302, Respondent AGC, and other parties. The record does not support the Court of Appeals' factual opinion.

A. LOCAL 302 DID NOT ENTER INTO IMPROPER "SIDE" AGREEMENTS. LOCAL 302'S MASTER LABOR AGREEMENTS ARE BONA FIDE.

1. The collective bargaining agreements used by the Industrial Statistician to set prevailing wage rates for Operating Engineer classifications are bona fide.

In a declaration provided by the AGC in this matter, it asserted that "[a]fter the first week of the strike, Local 302 approached several small employers and attempted to negotiate a 'side' agreement (as opposed to a comprehensive multi-employer agreement)." CP 374, ¶4. The Court of Appeals adopted the AGC's use of the term "side" agreements in its Decision. See Court of Appeals' Decision, p. 8. The AGC's use of the term "side" agreement is misleading. First, it mischaracterizes the nature of Local 302's negotiations with non-AGC contractors and, second, it implies that the AGC negotiates comprehensive multi-employer agreements, which it does not.

In 2018, Local 302 first reached agreement with 9 crane contractors who had formed their own association: the NWCOA³. All 9 contractors were legally bound to the outcome of the negotiations. The parties reached a final contract on September 6, 2018. Just prior to the NWCOA contract ratification, Local 302 also reached an agreement with a group of non-AGC contractors, resulting in the MLAWW. Between August 29 and October 12, Local 302 signed approximately 51 contractors to the MLAWW. CP 1930, ¶15. The wage package for the MLAWW and NWCOA agreements are identical. Id.

On September 6, Local 302 reached agreement with the AGC. The AGC economic package was slightly lower than the MLAWW and NWCOA packages. At Local 302's urging, the contract contained a lower rate for rural counties to reflect local market wages more accurately, consistent with the approach taken in the MLAWW and NWCOA contracts. CP 1932, ¶19.

The MLAWW and NWCOA agreements are not irregular "side" agreements. The MLAWW/NWCOA contracts resulted

³ The NWCOA group represents over 90% of crane rental companies in the State of Washington. CP 2071, ¶7.

from arm's length bargaining between Local 302 and dozens of sophisticated bargaining parties. The AGC's self-serving characterizations of Local 302's contract negotiations are demonstrably false.

2. A significant portion of construction hours are worked under Local 302's MLAWW and NWCOA agreements.

For the period of July 1, 2018, to June 30, 2019, approximately 800,000 hours were reported to the trusts under the MLAWW and NWCOA agreements. CP 2528, ¶10. Additionally, a large complement of work was performed on Project Labor Agreements at the same rates for a total of over 1,500,000 hours. *Id.* During the same period, workers employed under the Local 302/AGC contract worked a total of 3,636,242 hours. *Id.*

While more hours were reported under the AGC contract, none of those AGC contractors were bound to the outcome of the AGC's negotiations, and only 41 contractors authorized the AGC to accept the agreement with Local 302. The great majority of AGC contractors, unsurprisingly, simply choose to accept the AGC contract with a lower wage package following

negotiations. It follows that a large complement of the hours worked at “AGC” rates have no real association with the AGC’s collective bargaining activities.

In sum, Local 302 negotiated an arm’s length, industry wide, and uniform wage package; not a questionable “side” deal.

3. A comparison of Local 302’s 2018 AGC and MLAWW/NWCOA contracts reveals no evidence of collusion or abuse.

The Court of Appeals concluded that RCW 39.12.015 (as revised by SSB 5493) fails the second element of the *Barry*⁴ test for proper delegation of legislative power because, in part, it allows for “misuse of CBAs or abuse by private parties.” Decision at 13. The Court implied that Local 302’s 2018 negotiations with non-AGC contractors was evidence of such abuse. Id. at 8, 11-13. The AGC raises similar concerns referring to Local 302’s collective bargaining activities as collusive and irregular. Supplemental Brief of Respondents, p. 28. The foregoing conclusions are unfounded.

⁴ *Barry and Barry, Inc. v. Dep’t of Motor Vehicles*, 81 Wn.2d 155, 163-64, 500 P.2d 540 (1972).

The economic packages of Local 302's 2018 agreements with MLAWW/NWCOA and the AGC are nearly equal. Based on the Group I rate, the AGC total wage and benefit package⁵ for the first year was \$63.76 (\$43.79 wages and \$19.97 fringe benefits) for Districts 1 and 2.⁶ CP 2039. For the MLAWW/NWCOA, total package in Districts 1 and 2 was \$64.83 (\$44.33 wages and \$20.50 fringe benefits), or only \$1.07 higher total package. CP 1994, 1951.

In Districts 3 and 4, the Group I total packages were virtually identical; \$63.76 (\$43.79 wages and \$19.97 fringe benefits) for the AGC and \$63.83 (\$43.33 wages and \$20.50 fringe benefits) for the MLAWW and NWCOA.⁷ CP 2040, 1995, 1952. In sum, the differences in total wage and benefits packages between the AGC and MLAWW/NWCOA contracts',

⁵ The prevailing rate of wage as defined in RCW 39.12.010(1) "is the rate of hourly wage, usual benefits, and overtime paid in the locality..." The usual benefits are defined in WAC 296-127-014. Thus, the prevailing rate of wage is a combined total of wages and benefits.

⁶ Districts 1 and 2 are comprised of King, Snohomish, Island, San Juan, Skagit, and Whatcom counties. CP 2039-40.

⁷ Districts 3 and 4 are comprised of the counties Clallam, Jefferson, Mason, Grays Harbor Kitsap, Kittitas and that portion of Okanogan, Chelan, Douglas, and Yakima. CP 2039-40.

Group 1, was less than two percent in Districts 1 and 2 and seven cents in Districts 3 and 4. *Id.*

On the subject of “side” agreements, the Court of Appeals also noted (at AGC’s urging) that some contractors who negotiated the MLAWW were owned by “card-carrying members of Local 302.” Decision at 8. This is a red herring. All 51 contractors who signed the MLAWW in 2018 signed the same agreement with the same economic terms, regardless of whether the company was owned by an individual who learned the craft as a member of Local 302. CP 1930, ¶15. No collusion or irregularity is present and the AGC’s claims to the contrary wither under scrutiny.

B. RCW 39.12 CONTAINS PROCEDURAL SAFEGUARDS.

The Court of Appeals also concluded that RCW 39.12.015 (as revised by SSB 5493) fails the second element of the *Barry* test for proper delegation of legislative power because it “lacks appropriate ‘standards or guidelines,’” and “adequate procedural safeguards.” Decision at 13.⁸

⁸ Local 302 agrees with the other positions of the Department of Labor & Industries and defers to it on these points.

RCW 39.12 contains appropriate safeguards to prevent misuse by private parties. RCW 39.12.015 reads in relevant part (emphasis supplied):

(3)(a) Except as provided in RCW 39.12.017 and notwithstanding RCW 39.12.010(1), the industrial statistician shall establish the prevailing rate of wage by adopting the hourly wage, usual benefits, and overtime paid for the geographic jurisdiction established in collective bargaining agreements for those trades and occupations that have collective bargaining agreements. For trades and occupations with more than one collective bargaining agreement in the county, the higher rate will prevail.

As noted in Petitioner’s Supplemental brief (pp. 14-21), the Legislature’s use of the term “collective bargaining agreement” provides a measurable standard. The Industrial Statistician may only rely upon genuine agreements, negotiated at arm’s length, which are consistent with market forces, and free from irregularities.⁹ Accordingly, the Industrial Statistician, in the role of gatekeeper pursuant to RCW 39.12.015, has discretion to monitor compliance under that standard.

Moreover, the statute contains a mechanism for interested parties to demand review of any wage rate prevailed under RCW

⁹ See Declaration of Industrial Statistician Christensen. CP 2120-21.

39.12.015. RCW 39.12.065(1) provides, in relevant part (emphasis supplied):

Upon complaint by an interested party, the director of labor and industries shall cause an investigation to be made to determine whether there has been compliance with this chapter and the rules adopted hereunder....

The term “interested party” is broadly defined in RCW 39.12.010(4) (emphasis supplied):

(4) An "interested party" includes a contractor, subcontractor, an employee of a contractor or subcontractor, an organization whose members' wages, benefits, and conditions of employment are affected by this chapter, and the director of labor and industries or the director’s designee.

Thus, any contractor asserting collusion or other irregularity in a contract used to set a prevailing wage rate can initiate an investigation to ensure compliance with RCW 39.12.015.¹⁰ Moreover, under such authority the Director of Labor and Industries is authorized to investigate and ensure compliance under the statute.

¹⁰ No party, including the AGC, appealed the Industrial Statistician’s publication of the 2018 MLAWW/NWCOA wage packages. CP 2517, ¶9.

CONCLUSION

The Court of Appeals' decision should be reversed.

This document contains 2494 words, excluding the parts of the document exempted from the word count by RAP 18.17(b).

RESPECTFULLY SUBMITTED this 14th day of April 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on April 14, 2022, I electronically filed the foregoing **MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF** and **BRIEF OF *AMICUS CURIAE*** with the Clerk of the Court using the Washington State Appellate Courts' Portal, which will electronically send a copy to the following:

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