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January 12, 2023

By Hand Delivery and Electronic Filing

The Honorable Scott S. Harris
Clerk of the Court
United States Supreme Court
One First Street, NE
Washington, DC 20543

Re: *Glacier Northwest, Inc., d/b/a/ CalPortland v. International Brotherhood of Teamsters Local Union No. 174*, 21-1449 (U.S.)

Dear Mr. Harris:

I write to inform the Court that on January 11, 2023, the day after this Court heard argument in this case, the National Labor Relations Board Division of Judges denied Glacier's request to postpone the hearing in the Board proceedings until after this Court issues its opinion. A copy of the order is attached hereto.

Sincerely,

/s/ Noel J. Francisco
Noel J. Francisco

cc: Darin M. Dalmat (dalmat@workerlaw.com)
Elizabeth B. Prelogar (SupremeCtBriefs@usdoj.gov)

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
OAKLAND BRANCH OFFICE

GLACIER NORTHWEST, INC.
d/b/a CALPORTLAND

and **Cases 19–CA–203068**
19–CA–211776

TEAMSTERS LOCAL UNION NO. 174

ORDER DENYING RESPONDENT'S MOTION FOR POSTPONEMENT OF HEARING

Respondent Glacier Northwest, Inc. d/b/a CalPortland requests that the scheduled January 24 hearing regarding the unfair labor practice allegations against it in this proceeding be postponed pending a decision by the U.S. Supreme Court (SCOTUS) in *Glacier Northwest v. Teamsters Local 174*, No. 21-1449, cert. granted Oct. 3, 2022, a state court action it filed against Teamsters Local 174 (the Charging Party Union here) related to many of the same events (the Motion). This matter has been postponed at least 4 times before on Respondent's requests.

Both the General Counsel and the Union oppose Glacier's latest Motion. For the reasons set forth below, Glacier's Motion is denied.

On January 31, 2022, an Order Consolidating Cases, Consolidated Complaint, and Notice of Hearing ("ULP Complaint") issued in the above matter. The ULP Complaint alleges that Respondent committed numerous unfair labor practices in violation of §§ 8(a)(1) and (3) of the National Labor Relations Act (the "Act") in response to an August 2017 strike. These alleged unfair labor practices include: (1) discipline issued to 16 employees for leaving their ready-mix cement trucks at the outset of the strike on August 11, 2017; (2) discipline issued to 39 employees for failing to report to an August 19, 2017, mat pour immediately after the conclusion of the strike; and (3) the filing and maintenance of a lawsuit against the Union seeking damages as a result of the strike and the cancelled mat pour immediately after the strike. The ULP Complaint set the hearing in this matter for June 7, 2022.

The Regional Director then issued a series of orders rescheduling the hearing, often doing so at Respondent's request. Upon the Union's motion to reconsider an order postponing the hearing indefinitely, the Regional Director issued an order on October 28, 2022, setting the hearing for January 24, 2023.

On January 5, 2023, with both the ULP complaint hearing and oral argument at the Supreme Court in the Washington State Court action fast approaching, Respondent filed another motion to postpone the current ULP complaint hearing set for January 24, 2023, in Seattle, Washington.

Glacier's Motion Argues that the NLRB Division of Judges should postpone the ULP complaint hearing. The Motion argues, among other things, that the ULP complaint hearing should be postponed until at least the SCOTUS case involving the related Washington State Court action has concluded, and that:

(1) SCOTUS granted certiorari despite the Union's argument in its opposition to the petition that certiorari should be denied because the Regional Director had now issued a complaint;

(2) the General Counsel conceded in its amicus brief to SCOTUS that Glacier's intentional property destruction claim should not have been dismissed by the State Supreme Court based on *Garmon* arguably-protected preemption;

(3) the "questions of when preemption should apply and how the Board's procedures fit into that process" are "squarely before" SCOTUS;

(4) if SCOTUS finds that Glacier's intentional property destruction claim is not preempted, then under *Bill Johnson's* the NLRB may not proceed on the ULP complaint allegation regarding that filing and maintenance of that claim until the state proceedings have concluded;

(5) in determining whether Glacier's state lawsuit is preempted, SCOTUS may "provide authoritative analysis on what conduct is and is not protected during a strike," which would "unavoidably affect how the parties present their cases and how the Board evaluates arguments";

(6) given that four years have already passed since the relevant events, another five-month delay pending SCOTUS's decision would not prejudice any party; and

(7) "moving forward now would needlessly waste the resources of the parties and the Board on proceedings that will likely need to be redone" after SCOTUS's decision, "if not rendered unnecessary altogether."

Prehearing conference held in ULP proceeding. The following day, January 6, a prehearing conference was held via Zoom for video technology with the assigned administrative law judge (ALJ). Counsel for the parties advised the ALJ that if the Motion is denied as provided by this Order, the ULP hearing would likely last approximately 7–10 days, i.e., through early February 2023.

Oral Argument at the Supreme Court. On January 10, 2023, the SCOTUS held oral argument and the Washington State Court action case is now fully briefed.

The Counsel for the General Counsel Opposes the Motion and Further Delay. Today, before noon, the Counsel for the General Counsel (CGC) filed her opposition to the Motion arguing, among other things, that:

> Respondent's Motion … is essentially a further Supreme Court merits brief filed with the Division of Judges to elicit CGC's legal strategy in the instant ULP proceeding. The Division of Judges should decline Respondent's invitation to improvidently speculate as to the outcome of the appeal before the Supreme Court, and instead focus on what is certain: The answer to the question presented

to the Supreme Court will not, because it cannot, decide the dispositive legal issues in the Board's unfair-labor-practice proceeding against Respondent.

(1). The narrow issue before the Supreme Court is whether Respondent's state-court complaint ought to have survived the Union's motion to dismiss, which argued that the August 11, 2017 strike was at least arguably protected by the Act and therefore immune from state tort liability under *Garmon*. Because the allegations of Respondent's state-court complaint must be accepted as true in this procedural posture, the question before the Supreme Court is only whether Respondent's attorneys pleaded a viable claim alleging clearly unprotected conduct, or whether they have instead inadvertently pleaded themselves out of court. The General Counsel joined the government's amicus brief to the Supreme Court acknowledging that Respondent's complaint, taken on its own terms, "sufficiently alleges that truck drivers failed to take reasonable precautions to protect its property from imminent danger [on August 11, 2017,] and that such conduct was thus not actually or arguably protected by Section 7 of the Act." (SG Amicus Br. at 20).

That is not, however, the end of the matter, no matter how much Respondent attempts to spin the government's carefully articulated position as a dispositive "concession." (Motion at 10). A Supreme Court ruling that Respondent's complaint should have survived the Union's motion to dismiss would mean only that Respondent's complaint was competently drafted. Because *Garmon* preemption is jurisdictional, such a ruling would not preclude the Union from prevailing on preemption grounds at a later stage of the state case by "put[ing] forth enough evidence to enable the [state] court to find that the Board reasonably could uphold [its] claim" that the August 11, 2017 strike was actually protected. (SG Amicus Br. at 24 [citing *Int'l Longshoremen's Assoc. v. Davis*, 476 U.S. 380, 395 (1986)]).

In addition, Respondent ignores that the unfair-labor-practice complaint at issue here alleges that Respondent's lawsuit is preempted "relying on the facts found in [the Region's] investigation rather than solely on those set out in the state-court pleadings." (SG Amicus Br. at 27). Because of that fundamental difference, the Supreme Court's necessarily narrow ruling on the adequacy of Respondent's state-court complaint will have little bearing on whether that complaint must nonetheless fall when assessed in light of a fully developed evidentiary record. Thus, the government's amicus brief does not lend any support to Respondent's position concerning the impact that the Supreme Court's ultimate decision will have on this case.

(2). The unfair-labor-practice complaint involves more than just the discipline that Respondent issued in response to the Union's August 11, 2017 strike. The Regional Director's complaint also alleges that Respondent unlawfully disciplined employees for failing to report to work on August 19, 2017 in support of a mat pour scheduled for that day. (Complaint at para. 6(a), (c)). Although Respondent's lawsuit also attempted to hold the Union liable for purported interference with the mat pour, that claim was rejected on summary judgment and is not before the Supreme Court on certiorari. Therefore, the Supreme Court's resolution of the preemption question will have no impact at all on the separate allegations

concerning Respondent's retaliation against employees who failed to report to work on August 19, 2017.

(3). It is difficult to square Respondent's suggestion that the whole unfair-labor-practice case must be held in abeyance while any part of its state-court lawsuit plays out (Mot. at 14), with its counsel's acknowledgement to the Supreme Court yesterday that the Board's resolution of the protection question would be "extraordinarily useful" to the party the Board's ruling favors and "pretty persuasive" to the state court. (Transcript of Oral Argument at 40-41, Glacier Northwest, Inc. v. Int'l Brotherhood of Teamsters (No. 21-1449) https://www.supremecourt.gov/oral_arguments/argument_transcripts/2022/21-1449_7m48.pdf). There would be no mechanism for the Board to provide such "extraordinarily useful" guidance to a state court if, as Respondent now claims, the Board must stay its hand "until state court proceedings conclude." (Mot. at 14). Besides lacking coherence, Respondent's position gets things backwards. As the government's brief to the Supreme Court explained, now that the Regional Director's complaint has placed the protected status of the August 11, 2017 strike before the Board, the state tort suit can proceed only "[i]f the Board finds the conduct unprotected." (SG Amicus Br. at 31).

(4). As the government's amicus brief sets forth, the "arguably protected" element of the *Garmon* preemption test is satisfied in all but exceptional circumstances by the issuance of a complaint from the General Counsel. (SG Amicus Br. at 26 [citing *Davis Supermarkets, Inc. v. NLRB*, 2 F.3d 1162, 1179 (D.C. Cir. 1993); *Makro, Inc., d/b/a Loehmann's Plaza*, 305 NLRB 663, 670 (1991)]). Here, the Regional Director has issued a consolidated complaint alleging that Respondent unlawfully disciplined employees for engaging in protected concerted activity on August 11 and 19, 2017. Even if the Supreme Court were to rule in Respondent's favor and remand for further proceedings, as soon as the state court litigation were revived, applicable Board precedent would require Respondent to seek a stay of the litigation until the Board concludes litigation of the unfair-labor-practice complaint. *Loehmann's Plaza*, 305 NLRB at 671, n.56. As also noted by the Solicitor General, "disputes about whether Section 7 protects an activity fall within the Board's special competence," and while "the Board's jurisdiction 'is not the last word'—it remains subject to judicial review in a federal court of appeals—'it must assuredly be the first.'" SG Brief at 4-5 (citing *Marine Engineers v. Interlake S.S. Co.*, 370 U.S. 173, 185 (1962)).

The Charging Party Union Also Opposes the Motion and Further Delay. Today, before noon, counsel for the Charging Party Union filed their opposition to the Motion (CP Opposition) including Exhibit 1 attached thereto which is a copy of Glacier's Position Statement to the National Labor Relations Board dated February 21, 2018, including Exhibits A through C, arguing, among other things, that:

> … As to facts, Glacier first fails to note the nature of the record before the Supreme Court or the procedural posture under which that record is being considered: Glacier appeals the affirmance of its lawsuit's dismissal at the 12(b) stage. Accordingly, the record does not include any evidence adduced through

discovery or tested through adverse party examination; it consists entirely of Glacier's own complaint and self-serving declarations, which are accepted as true solely for purposes of evaluating Local 174's 12(b) motion. Thus, Glacier's Supreme Court appeal inherently cannot address the actual facts of the underlying dispute, which will be brought forward at the January 24 unfair labor practice hearing. Second, Glacier conveniently omits the facts that explain the alleged "delay" in scheduling the Board hearing: (a) the General Counsel appropriately waited for the state court to completely and finally resolve those portions of the litigation that do affect the merits of her complaint allegations; and (b) once the General Counsel issued her complaint, Glacier sought and received two continuances of the hearing.

Glacier's motion also rests on several legal errors that fatally sever the artificial link Glacier draws between the two proceedings.

First, Glacier assumes that, should the Supreme Court rule in its favor and find its claims non-preempted, that ruling would finally resolve the preemption question and preclude the Board from holding it liable under Section 8(a)(1) of the Act. Glacier is doubly wrong. A Supreme Court ruling adverse to Local 174 would establish only that, on the bare pleadings and Glacier's self-serving declaration, the state court lacked sufficient evidence to divest itself of jurisdiction. But preemption is a jurisdictional question and can be raised at any time. Since further factual development in state court could change the preemption analysis, an adverse Supreme Court ruling would not be the final word on preemption even in state court. More significantly, the Board need not await the state court's decision on the preemption question before determining for itself whether Glacier's claims are NLRA-preempted. Board case law, backed by Supreme Court precedent, expressly holds otherwise. The Board always retains the statutory power to hold state law claims NLRA-preempted based on its own fact-finding and adjudication. Indeed, it is because of that authority that the General Counsel or Board may, if necessary, seek to enjoin or direct the ULP respondent to halt prosecution of *still-pending* claims.

Second, Board and circuit court precedent make clear that the issuance of the General Counsel's complaint—a development outside the judicial record, the significance of which the Supreme Court might well not address—automatically demonstrates the existence of arguably protected conduct which in turn triggers preemption. Thus, were Glacier's lawsuit to return to Washington state court, the General Counsel would, as a matter of course, direct Glacier to seek a stay of state court proceedings.

Third, Glacier's repeated insistence that its claims are soundly based in state law conflates two distinct grounds pursuant to which its lawsuit against Local 174 may be found to violate Section 8(a)(1) of the Act. One requires showing that a state court cause of action is legally baseless, a question which turns on the merits of the underlying state law theory. *See Bill Johnson's Restaurant, Inc. v. N.L.R.B.*, 471 U.S. 731, 742–46 (1983). The other, based on footnote 5 of *Bill Johnson's*, *id*. at 737, n.5, requires showing only that (a) the cause of action is preempted by the Act because it targets actually or arguably protected conduct, which depends only on an interpretation of the Act, and (b) the pursuit of the claim tends to chill

> protected conduct. Glacier's state court claims on appeal before the Supreme Court implicate the second kind of 8(a)(1) violation. Therefore, no aspect of Glacier's appeal—or any hypothetical remand thereof—will involve a ruling on a question of Washington state law to which the Board would defer.
> Fourth, Glacier's suggestion that the Board should await the Supreme Court's guidance on the nature of the right to strike falls flat because, in deciding whether Glacier's lawsuit is facially preempted, the Court will not, and by statute cannot, usurp the Board's power to initially interpret the Act based on real facts. At most, the Court will decide whether Glacier's undisputedly untested complaint allegations—which the Board hearing will reveal to be untrue or incomplete—present a case for an arguably protected strike.
> And fifth, the Region's delay in issuing a complaint resulted from the very deference to state courts that Glacier champions. Likewise, any delay in scheduling a Board hearing has arisen from the Region's generous accommodation of Glacier's interests. Glacier can therefore not be heard to invoke that accommodation to urge further delay. (CP Opposition at 1-4, footnotes omitted.)

The CP Opposition also argues that: (1) the Board already retains the authority to find state court claims preempted, regardless of whether the state court, or the Supreme Court sitting in review, has so far declined to preempt the same claims based on an undeveloped factual record; (2) Glacier fails to refute that under *Loehmann's Plaza*, the General Counsel's complaint automatically establishes drivers engaged in arguably protected conduct, its lawsuit is preempted, and it will be required to seek a stay of the case, should the Supreme Court reinstate its work stoppage claims; (3) Glacier attempts to enmesh questions of state law into preemptive inquiry by invoking *Bill Johnson's* objective baselessness standard, which does not apply to the General Counsel's footnote 5 theory of liability; (4) there is no need to await the Supreme Court's guidance on the nature of the right to strike when the Court will not directly interpret the Act; and (5) the General Counsel's delays in issuing the complaint and scheduling the hearing were mandated by law or served to accommodate Glacier. (CP Opposition at 8-20.)

After reviewing all of the filed pleadings and case file herein, I find that the General Counsel's ULP complaint at issue here alleges that Respondent's lawsuit is preempted relying on the facts found in the Region's investigation including allegations that Respondent unlawfully disciplined employees for failing to report to work on August 19, 2017 in support of a mat pour scheduled for that day rather than solely on those alleged facts set out in the Washington State Court pleadings and that because of that fundamental difference, the Supreme Court's expected upcoming narrow ruling on the adequacy of Respondent's state-court complaint will have little bearing on whether that complaint must nonetheless fall when assessed in light of a fully developed evidentiary record in the ULP complaint case. Because *San Diego Building Trades Council v. Garmon's,* 359 U.S. 236 (1959), preemption is jurisdictional, such a ruling would not preclude the Union from prevailing on preemption grounds at a later stage of the state case by putting forth enough evidence to enable the state court to find that the Board reasonably could uphold its claim that the August 11, 2017 strike was actually protected. See *Int'l Longshoremen's Assoc. v. Davis*, 476 U.S. 380, 395 (1986)(State action not preempted because

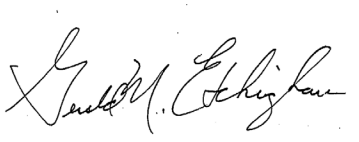
party seeking preemption failed to meet burden of proof that ship's superintendent arguably was employee rather than statutory supervisor).

I further find that the Regional Director's subsequent issuance of the ULP complaint in this case now independently establishes that the truck drivers' conduct was at least arguably protected, which allows the hearing in this case to go forward on January 24 before an ALJ. I further find that *Loehmann's Plaza*, 305 NLRB 663, 669 (1991), provides that the Regional Director's issuance of the ULP complaint in this case following the State Supreme Court's decision constituted a determination that the strikers' conduct was at least arguably protected by the National Labor Relations Act, as amended (NLRA) and that this agency became the exclusive forum for adjudicating whether the strikers' conduct was protected; and that, even if SCOTUS reverses the Washington State Supreme Court, the lawsuit would be remanded to the state courts where *Glacier* would likely be obligated to seek a stay until the conclusion of this NLRB proceeding.

I further find that the ULP complaint has firmly placed the protected status of the August 11, 2017 strike before the Board and given that four years have already passed since the relevant events, more delay by postponing the January 24 hearing prejudices all parties and maintaining the January 24 hearing before an ALJ of this agency provide judicial economy, expediency, and expertise of subject matter to adjudicate the case. Moreover, as factfinder, some of the ALJ's findings and legal conclusions may become law of the case and/or preclude the time and expense of future issue or claim determinations in related proceedings.

For the reasons stated above, the Respondent's Motion to Postpone Hearing is **DENIED** and the Tuesday, January 24, 2023 hearing in this matter will go forward as scheduled. As agreed by all parties, the hearing in this case will commence on Tuesday, January 24, 2023, in person, at the Jackson Federal Building, 915 Second Avenue, Suite 2948, Seattle, Washington, and go forward on 10 consecutive days thereafter thru Feb. 6 (Jan. 24–27, 30, 31, and Feb. 1–3, 6).

Dated, Oakland, California, January 11, 2023.



Gerald M. Etchingham
Associate Chief
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that I have this 11th day of January 2023, caused copies of the foregoing document entitled, ORDER DENYING RESPONDENT'S MOTION FOR POSTPONEMENT OF HEARING, to be delivered by electronic mail upon the following representatives:

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