

In The
Supreme Court of the United States

Gerald Nelson,
Petitioner,

V.

ALMALGAMATED TRANSIT UNION LOCAL 1181-1061, AFL-CIO
MV. TRANSPORTATION, INC, JESSICA D. OCHS, MICHALAIRE
PHANTOR,

Respondent,

On Petition for Writ Of Certiorari
To The United States Court Of Appeals For The
Second Circuit

PETITION FOR WRIT OF CERTIORARI

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LIST OF ALL PARTIES

X all parties appear in the caption of the case on the cover.

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QUESTIONS PRESENTED

In *Hazel-Atlas Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944), The Supreme Court held that in a case of after-discovered fraud, “relief will be granted against judgments regardless of the term of their entry.” The Court of Appeals had the power and the duty recall the ordered mandate. The Court of Appeals never acknowledged the failure of the attorneys to report taxable items concerning the deducted unemployment benefits the attorneys left unreported to the IRS in the motion to recall the mandate. The Second Circuit affirmed the District Court in its summary order based on the fact that the case was not a 301 Labor violation due to the reasoning that there was “no persuasive argument that Appellees were required to adopt Nelson’s preferred interpretation of ‘made whole’—the relevant language from the initial arbitrator award much less that the union ‘acted[ed] in such discriminatory, dishonest, arbitrary, or perfunctory fashion as to breach its duty to fair representation in failing to do so.’” .

The Questions presented here are:

1. Whether, under IRS code, an attorney has the duty to report all taxable items involved in a private settlement, specifically, taxes required to be paid on unemployment benefits withheld from a union member as a result of the settlement. And if not, whether under IRS code it is the duty of the union member to pay taxes on wages never received.
2. Whether a mandate should be recalled when it has been uncovered that the IRS code has been violated in a 301 management case, specifically, on a account of tax fraud in the case of

a union member ordered to pay taxes on money not received, when the parties who made the private settlement (union and employer) did not report these taxable items to IRS or inform the union member of his requirement to pay.

3. Whether a union and employer conspires to defraud government when they fail to report taxes to the government.

ORDERS BELOW

1.The Summary Order of the United States Court of Appeals for Second Circuit dated as June 16, 2016 has been reported and is reproduced as Appendix A.

2.The Order Panel Rehearing, or in the Alternative, for Rehearing in en banc of the United States Court of Appeals for the Second Circuit is Dated September 14, 2016 is reproduced as Appendix B.

JURISDICTION

This Court jurisdiction is invoked under 28 U.S.C. 1254 (1) ,the Order denying Motion to Recall Mandate Dated and entered October 20,2017. This Petition for Writ of certiorari is filed within 90 days of that date.

STATUTORY PROVISION INVOLVED

The doctrine of Complete Preemption 301 Labor Management. (29 USC. 185).

STATEMENT

This case raises important lingering question about attorneys (officers of the court). When Petitioner Gerald Nelson filed a motion to recall the mandate for Fraud upon the Court. The validity of a 301 labor management cases when acts of artifice, false statements, intentional misstatements of law are presented by genuine fictitious briefs to the Second Circuit court of appeals by not telling the court of appeals that a private settlement and unemployment wages were unreported to the internal revenue service. This information was concealed by the attorney's in there briefs in order to deceive Gerald Nelson and the Second Circuit court of appeals. The attorney's clients withheld taxes and subtracted unemployment wages (taxable) from the private settlement and did not report the the private settlement or the unemployment wages to the internal revenue service. But in fact, they kept Gerald Nelson's unemployment money and defrauded the Government because this information was never reported to the Internal Revenue Service which is Fraud, Tax Fraud and Tax evasion. Gerald Nelson has consistently pointed out that his money should not have been taken in this manner. But the attorneys' skillfully fabricated this information in there briefs that they did everything in accordance with the law. The notice of deficiency from the Internal Revenue clearly shows that everything was not done by law, because it shows that Gerald Nelson is responsible for paying the taxes when the Attorneys clearly stated in there briefs that local 1181-1061 and Mv transportation subtracted the money from the back payment agreement. This is the statement that was made in the brief for the defendants MV transportation page 7,8 (Attorney Jeffrey D. Pollack)

States “On August 28 2014, Arbitrator Shriftman issued a supplemental decision (the “Supplemental Award”), holding that: back pay is a term of art and means the amount the employee would have earned had he/she not been discharged less what the employee did earn... Where an employee receives income from any source that is in any way related to the loss of employment ... that amount constitutes a deduction in the calculation of a make whole remedy.

In accordance with the Supplemental Award, MV and the Union entered into an agreement (the “Backpay Agreement”) stating that the backpay payable by MV would be calculated by taking the gross wage lost (\$18,404.40) and subtracting the amount Petitioner received in unemployment insurance benefits (\$6,471.00). From that amount(\$11,993.40), MV made legally required withholdings and deductions and then paid Nelson the net amount of 5,837.”

This is the statement made in brief of defendants-appellees Local 1181-1061 Amalgamated Transit Union, AFL-CIO pages 11 and 12 (Attorney Richard N. Gilberg, Richard A. Brook). The brief states “ On or about September 5, 2014, Local 1181 and the Company entered the Back Pay A agreement. See A25 (Back Pay Agreement); A66 (CPLT 17). The Company then paid Nelson in accordance with the Back pay Agreement. See SA & (CPLT 18); SA54 (Nelson paycheck annexed to the Complaint as Exhibit E). Nelson received the gross back wages owed him (\$18,404.404), less the amount he received from New York Unemployment Insurance (\$6,471.00) and taxes the company withheld from Nelson’s back pay. The Back Pay Agreement avoided the further delay and expense of arbitrating the amount of back pay owed Nelson, expedited payment to Nelson by requiring the Company to pay him within ten calendar days of the Back Pay Agreement, and required the Company to make deduction in the most favorable manner to Nelson permitted by law, and requires the company to reimburse Nelson if New York

State requires him to repay any amount of unemployment compensation. See A25 (Back Pay Agreement 4-6).”

To this present date not one of the parties responsible for the Private settlement and Gerald Nelson’s unemployment wages being taken from him want to talk about him being reimbursed. In fact, Nelson is due in Tax Court in May for this very situation that has been imposed on him. Gerald Nelson will not be a part of co-conspiracy to defraud the Government or unemployment fraud. This private settlement was nothing more than a elaborate scheme to defraud the Government and not make Gerald Nelson whole in accordance with the arbitrator’s Directive.

Petitioner Gerald Nelson’s (hereinafter Nelson) motion to recall the mandate for fraud upon the court dated October 20, 2017 was never opposed by the respondents.

The motion to recall the mandate was due to newly discovered evidence and information from Internal Revenue Service (Notice of deficiency) the respondents Lawyers Esq. Richard A. Brooks, Esq. Richard N. Gilbert and Esq. Jeffrey Pollack (hereinafter local 1181-1061 and MV lawyers) concerning misleading information about taxes that were never paid to the internal revenue service (hereinafter IRS) , specifically unemployment and a back pay agreement made by MV ’s General manager and Local 1181-1061 ATU. This information should have been reported to the IRS because both items are taxable items. Instead, contrary to the back pay agreement Nelson was reported as owing money that he never received from the back payment (unemployment) because it was taken away from him in the back pay agreement.

This Procedure that MV and Local 1181-1061 used in the back pay agreement was nothing more than conspiracy to defraud the Government and use Nelson as a co-conspirator.

Nelson would like to restate some of the occurrences in this case to refresh the Court's memory. Because this is not the first time this case has been in front of the United States Supreme Court (doc.16-7966).On March 6, 2014 Nelson was terminated by MV Transportation without just cause due to an unpreventable accident. The issue of whether Nelson was terminated for just cause was submitted to the arbitration.The arbitrator found "there was simply no basis to terminate Nelson for the accident in question." The arbitrator ordered MV transportation to reinstate Nelson and make him whole, further the arbitrator retained jurisdiction to address any disputes concerning back pay.

On August 25, 2014, counsel for the parties requested that the arbitrator issue a supplemental award clarifying how back pay should be calculated that did not include arithmetical calculation.

On September 5, 2014 , Respondents Mitch Phantor, General Manager and Jesseca D. Ochs Attorney for local 11181 -1061 during arbitration, independently entered into a back pay agreement without informing Nelson. Due to the back pay settlement, Nelson was deprived of more than 12,000 dollars that was removed from the arbitration award that equals Nelson's unemployment, overtime, and holiday pay. Nelson has not been compensated for this financial loss to the present day.

Nelson filed a claim in state Court raising state law claims for misrepresentation, fraud, breach of contract, breach of fiduciary duty, malpractice, unjust enrichment, conversion, requesting a Jury trial, and requesting modification of the arbitration award under CPLR section 7511 (c).

Respondent removed the case to federal court stating that Nelson's claims were presented

under section 301 of the Labor Management Relations Act 29 USC 185. Nelson filed a motion to remand and was denied by the District Court. The District Court construed the allegation to state a hybrid claim of breach of the collective bargaining agreement and breach of the union duty of fair representation and ruled Nelson did not state a claim for relief. The Second Circuit issued a summary order stating “that the arbitrator specifically contemplated that additional income, such as unemployment benefits, would be set off against the back pay award” (See summary order Page 4 line 13,14). The Summary order affirmed the District Court. The Back pay Agreement reads as follows:

This agreement is entered into by local 1181 ATU (“Local 1181 “or the “Union) and MV Transportation, Inc (“MV or “The Employer”) collectively referred to herein as (“the as the parties”).

1. On June 30,2014, Arbitrator Elliot D. Shriftman issued an award in which he found that MV did not have just cause to discharge Gerald Nelson and ordered that “[Nelson] shall be reinstated forthwith and made whole”.

2. On August 27,2014, the Arbitrator issued a supplemental award clarifying how back pay may be calculated.

3. MV reinstated Nelson in and around July 1,2014.

- 4.The parties want to avoid Further delay and expense of arbitrating the amount of back pay owed Nelson.

- 5.MV shall pay Nelson within the ten (10) calendar days the sum of 11,933.40 less applicable taxes and other payroll deduction, in full settlement of his arbitration case,deductions in full

settlement of his arbitration case; deductions shall be made in the most favorable manner to the employee permitted by law. The gross amount due Nelson represents gross back pay owed.

6. for the approximate 21 weeks Nelson was out of work, \$18,404.40, less \$6,471.00 that Nelson received from the state in unemployment benefits.

7. In the event Nelson is required by New York state to repay any amount of unemployment compensation because of his reinstatement, the company shall reimburse him for such amounts as he may be required to pay.

8. The parties agree and acknowledge that the term of this agreement contain a full revolution of all matters pertaining to Nelson's employment of his termination from employment with MV.

9. The parties agree that any dispute over the interpretation or application of this agreement shall be submitted to the Arbitrator Elliot Shriftman for binding arbitration as soon as practicable.

The IRS is now asking Nelson for the unemployment money because it was never reported by local 1181-1061 and MV .

THE COURT OF APPEAL ORDER.

The Court of Appeals Second Circuit issued a motion order dated October 20, 2017 denying the motion to recall the mandate (Fraud Upon The Court). Nelson is appealing this final order to this court. (United States Supreme Court).

REASON FOR GRANTING THE WRIT PETITION

This is a excerpt from an article that was written about employment tax schemes: "... unfortunately, some employers attempt to evade their employment tax responsibilities. There are many reason for this some cash-starved businesses try to use the IRS as a bank-they withhold the employment taxes from their employees paychecks and then 'borrow' the money short with intent to pay it back later. Others simply take the money with no plan ever to repay it .Some employers are misguided "tax protesters" who mistakenly believe that all federal taxes are unconstitutional" (Fisherman, Stephen, J.D.). As far as the IRS is concerned, whatever the reason, not paying taxes is just the worst thing a business can do. Former IRS Commissioner Mark W. Everson said that "Failure to pay employment taxes is stealing from the employees of the business" Employers who engage in this practice face harsh civil and criminal penalties, including jail time." (Fisherman, Stephen, J.D.)

This is another excerpt from an article that was written about tax avoidance and tax evasion: Employment tax fraud examples "failure to withhold /pyramiding: an employer fails to withhold federal income tax or fica taxes from employees paycheck, or withholds but fails to report and pay these taxes" (by Murray, Jean). From Nelson's viewpoint and abusive tactics by Local 1181-1061 and MV Lawyers this boils down to nothing but Fraud upon the Court. (Second Circuit Court Appeals and any other court that this information has been presented)

I. THE MOTION DENYING NELSON'S MOTION TO RECALL THE MANDATE
(FRAUD UPON THE COURT) CONFLICTS WITH NEWLEY DISCOVERED
EVIDENCE STANDARD.

Nelson's Notice of Deficiency issued by the IRS (internal revenue service) was presented as evidence to the second circuit court of appeals in the motion to recall the mandate dated October 20, 2017. This information clearly shows that the attorneys for local 1181-1061 misrepresented the private settlement and gave false statements to the second circuit court of appeals. The Notice of Deficiency establishes primie facie evidence. The Second Circuit court of appeals decision to recall their mandate after newly discovered evidence in Nelson's motion to recall the mandate departs from the accepting and usual course of judicial proceedings as to call for the exercise of the United States Supreme Court Supervisory Power.

The assessment of the commissioner of internal revenue was primie facie evidence (see United States v. Rindskopf, 105 US 418, (point 2 of opinion). The panel decision not to use the newly discovered evidence as proof to prove unreported taxes and tax fraud when there was no opposition from respondents damaged Nelson's ability to successfully prove his case. However Nelson was not given a evidentiary hearing.

The Court of Appeals has the inherit power to recall their mandates (see Calderon v. Thompson, 523 US 538, 549,550 (1998). In Sergeant v. Columbia Forest Prods, Inc. 75 F.3d 86,89 (recognizing that the courts have inherit power to recall mandates) "Where supreme Court review is know longer available and the court of appeals judgement has become final, that power must be " exercised sparingly" and is reserved for exceptional circumstances."

Nelson believes this is an exceptional circumstance. Anyone who violates an Internal Revenue Code in the process of litigating in the truth process of a case on appeal to defraud the government should be held responsible in a Court of Law. According to New York Code of Professional Responsibility Canon 7 "A lawyer should represent a client zealously within the bounds of the law. NYDR7-102 (b) (1) which requires a lawyer who receives information establishing clearly that the client has in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon the client to rectify the same, and if the client refuses or is unable to do so, the lawyer shall reveal the fraud to the affected person or tribunal, except when the information is protected as confidential or secret." Local 181 and 1061 and MV lawyers have made Nelson legally responsible for unemployment wages that were taken in the private settlement and not reported.

Local 1181-1061 and the MV lawyers have clearly stated in the back pay agreement that they have taken the unemployment money. Since the money has not been reported it looks like Nelson has committed tax and unemployment fraud. A union member only recourse in a situation like this is a 301 labor management case. It is self evident that local 1181-1061 is not going to reimburse Nelson. This is why Nelson is asking this Court, the Highest Court in this country, to stop these practices by using its supervisory powers, and grant certiorari. Unions are set up to protect union members, not to hurt them by making them pay for tax bills for which they are not responsible for or putting them in a position of violating law.

II. THIS DECISION (ORDER) CONFLICTS WITH RULE 60 (b), 60 (d) (3) AND PRIOR DECISIONS OF THIS COURT AND OTHE COURT OF APPEALS.

The Hazel-Atlas doctrine Hazel-Atlas Glass Co. v. Hartford-Empire Co. 322 U.S. 238 (1944), is based on a saving clause in Fed. R. Civ. P. 60 (b), which specifically provides for the continuing existence of this equitable power outside and independent of that rule. There is no statute of limitation for bringing a fraud upon the court claim.

As the Seventh Circuit has explained “ a decision to produce fraud upon the court is not in essence a decision at all and never becomes final. *Kenner v. Commissioner of internal revenue*, 387 F.2d 639 (7th Cir. 1968).

Nelson has presented the Notice of Deficiency and the back pay agreement to the Court of Appeals which clearly shows that the respondents admit that they took or subtracted the unemployment from the back pay agreement, but this information was never reported to the IRS instead Nelson is responsible for the money that the respondents took. Nelson has confronted the situation in the Court of appeals by Motion To Recall The Mandate Fraud upon the Court but the Respondents did not answer the motion. To this present day I have not gotten one phone call about reimbursement or how to halt the tax court from coming after me for this fraudulent and unreported back pay agreement which now has me co-conspire with them to defraud the government.

Similarly, in *Toscano v. C.I.R.*, 441 F. 2d 930 (9th Cir. 1971), a taxpayer fraudulently filed a joint tax return, falsely claiming that he was married and then carried this fraud into the tax court when the taxpayer sought a redetermination of his tax liability. He lost the redetermination case, and the fraud was discovered when the woman whom the taxpayer falsely claimed was his wife.

filed an independent action to set the tax redetermination judgement aside. The Ninth Circuit concluded that this conduct was more than just fraud on the woman who had been unfairly subjected to a judgement to pay part of the fraudulent taxpayer's taxes. The Ninth Circuit concluded that the taxpayer had committed Fraud On The Court.

Nelson presently still works on the job (workers compensation) and presently is expected to show up in Tax Court for these documents that have been stated in this Writ of Certiorari Petition.

Nelson case was a 301 labor management case which now have all the implications of tax fraud. because the unemployment was never reported. union members should not have to second guess a private settlement or a unions duty. The Arbitrator had given Nelson his award in accordance with the collective bargaining agreement and law. The private settlement that was made is in violation of the administration of the internal revenue code and is not permitted by law. Because the taxes were not reported on the unemployment that was taken from Nelson back pay agreement.

III. THE DECISION(ORDER) CONFLICTS WITH 26 US CODE 61 GROSS INCOME INTERNAL REVENUE CODE.

Commissioner v. Shleier 515 US 323 (1995) States: "section 61 (a) of the internal code provides a broad definition of 'gross income'. Except otherwise provided in this subtitle, gross income means all income from whatever source derived "26 USC 61 (a) we have repeatedly emphasized the "sweeping scope" of this section and its statutory predecessors commissioner v Gleeshaw"

Both Local 1181-1061 and MV lawyers filed there briefs stating everything was permitted by law on 12/22/2015/ Nelson Notice of deficiency states his petition had to filed with tax court by May 30,2017. Nelson has filed a earlier writ of certiorari with this Court on 02/21/2017 (doc.129 Court of appeals) docket no. 16-7966 in this court. The newly discovered information was not apparent to Nelson when the earlier writ of certiorari was filed.

Nelson is plainly stating that the private settlement nor the unemployment wages were not reported to the IRS which the Notice of deficiency was presented for proof of evidence to Second Circuit. And Local 1181-1061 and MV Lawyers admit they took the unemployment from the back pay agreement in their briefs. With this information discovered or disclosed by local1181-1061 and MV lawyers , Nelson 301 labor case outcome would have been totally different considering that the internal revenue tax code was violated due to unreported taxes. This is what this Court stated in DelCostello v. Int'l of Teamster 462 US 151,,164 (1983) :

“ In Vaco and Hines, However, we recognized that this rule works an unacceptable injustice when the union representing the employee in the grievance/arbitration procedure acts in such a discriminatory, dishonest ,arbitrary , or perfunctory fashion as to breach its duty of fair representation. In such a instance, an employee may bring suit against both the employer and the union , notwithstanding the outcome on finality of the grievance or arbitration proceeding Vaco, 386 US 171.”

Nelson believes he has presented sufficient proof to warrant a evidentiary hearing and for the mandate to be recalled. Unless he has presented documents to the court that are untrue,so far local 1181-1061 have been silent on this issue. collective bargaining agreements are sacred books and law to a union member which makes this case important and calls for this Courts supervisory

powers. Because a employee's /union member outcome of his arbitration should not be concealed from him.Only to find out that his union and company have defrauded the Government under the disguise of a private settlement (Fraud).

CONCLUSION

FOR ALL THESE REASONS,THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,



Gerald Nelson Pro Se

Dated: January 16, 2018