

NO: 17-8091

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IN THE SUPREME COURT OF THE UNITED STATES

Gerald Nelson

Petitioner,

V.

Amalgamated Transit Union Local 1181-1061

AFL-CIO MV Transportation, Inc. Jessica D. Ochs, Michalaire Phantor  
Respondent,

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ON PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATE COURT OF APPEALS  
FOR THE SECOND CIRCUIT COURT

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CORRECTED PETITION FOR REHEARING  
IN THE INTEREST OF JUSTICE

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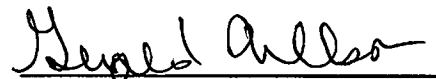
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**CERTIFICATE OF COUNSEL (pro se Gerald Nelson)(Rule 44)**

As petitioner Gerald Nelson, I hereby certify that this Corrected Petition For Rehearing from denial of certiorari (entered on May 14, 2018) is presented in good faith and not for delay, and that it is restricted to the grounds specified in Rule 44.2, namely intervening circumstances of substantial or controlling effect and substantial grounds not previously presented.

I declare under penalty that the foregoing is true and correct.

Executed on July 3, 2018



Gerald Nelson  
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Brooklyn, NY 11233  
Tel 347-737-2217



PETEGAY A. JOHNSON  
NOTARY PUBLIC-STATE OF NEW YORK  
No. 01JO6198595  
Qualified in Kings County  
My Commission Expires 04-10-2021

July 3, 2018

## QUESTIONS PRESENTED

1. Whether the union breaches its duty of fair representation by deducting unemployment from back pay agreement and if so was the union and the employer required to go back to the arbitrator?
2. Whether 301 labor Management requires the lower courts to interpret the labor contract before dismissing a case?
3. Whether an employee is made whole after unemployment is deducted from back pay award?
4. Whether unemployment and state taxes or non-negotiable employee rights conferred by state law that cannot be preempted by 301 labor management unless they are made part of the contract ?
5. Whether it was an abuse of discretion to dismiss 301 labor management case ?  
( District Court )

## **CORRECTED PETITION FOR REHEARING**

Petitioner herein in respectfully moves this Court for an order (1) vacating its denial of petition for writ of certiorari , entered on May 14, 2018, and (2) granting petition as grounds this motion, petitioner states following:

### **FACTUAL & PROCEDURAL BACKGROUND**

On March 6, 2014, Gerald Nelson ("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 arbitration. The Arbitrator found "there was simply no basis to terminate for the accident in question." The Arbitrator retained jurisdiction to address any dispute concerning back-pay.

On August 25, 2014, counsel for the parties requested that the Arbitrator issue a supplemental award that would clarify how back-pay should be calculated. The first award and the supplemental award did not include any arithmetical calculation.

.On or about September 5, 2014, Local 1181 ( "The Union"), and the MV Transportation ("MVT") entered into a back pay agreement. The check Nelson received stated gross wages of (18,404.40), less the amount Nelson received from New York State Unemployment Insurance (\$6,471.00) and taxes the company withheld from Nelson's back pay.Nelson net pay was 5,837.80. However the settlement taxes were never reported, by MVT or the Union .Nelson received a Notice of deficiency stating he owed the taxes on the unemployment.

On September 29, 2014 Nelson filed an action in Kings County Supreme Court raising

State law claims for misrepresentation, fraud, breach of contract, breach of fiduciary duty, malpractice, unjust enrichment, conversion, request for a jury trial, and that the award be modified under 7511 (c).

February 10, 2015, MVT and the Union removed the case to Eastern District Court of New York.

On March 6, 2015 MVT and the Union moved to dismiss.

On March 12, 2005 Nelson filed a motion to remand. MVT and the Union did not oppose this motion to remand.

However, on March 17, 2015, the District issued a Decision and order denying Nelson's motion to remand.

On March 29, 2015, Nelson filed a FRCP 59 (e), altering or amend judgement. However District Judge Brian M. Cogan (Presiding Judge), called it a motion for reconsideration.

On April 3, 2015, the District Court issued a Memorandum Decision and Order granting MVT and the Union motion to dismiss and denying and denying Nelson motion FRCP 59 (e) motion which was called a reconsideration motion. Judge Cogan stated all of Nelson's claims boil down to "one central contention-that defendants wronged plaintiff-call it fraud, breach of contract, or whatever- by entering into the back pay agreement. As a result, according to Judge Cogan, Nelson was actually asserting a hybrid Section 301 claim.

On April 17, 2015, Nelson filed a Notice of Appeal from the March 17, 2015

Decision and Order and the April 7, 2015 final Judgement.

It should be noted the back pay agreement was signed Mitchalaire Phantor (General Manager) and Jessica D. Ochs (Lawyer for the Union).

### **SECOND CIRCUIT SUMMARY ORDER**

Second Circuit affirmed district courts . Stating "Nelson was therefore required to show that , in reaching the agreement , his employer breached the CBA and his union breached its duty of fair representation. As the district court ruled, there was no breach. The arbitrator's supplemental award specifically contemplated that additional income, such as unemployment benefits, would be set off against the back pay award. And even if Nelson were correct that the supplemental award was somehow invalid, he has presented no persuasive argument that Appellees were required to adopt his preferred interpretation of "made whole"- the relevant language from the initial arbitral award -much less that the union "acted[ed] in such a discriminatory,dishonest ,arbitrary,or perfunctory fashion as to breach its duty of fair representation"in failing to do so.See DelCostello v. Int'l Bhd. of Teamster, 462 U.S 151.164 (1983).

### **GROUND FOR REHEARING/IN THE ALTERNATIVE GVR ORDER**

#### **IN THE INTEREST OF JUSTICE**

Second Circuit ignored the procedural posture of Nelson complete case. And did follow controlling Supreme Court decision.The United States Supreme Court has held that unemployment benefits are not "earnings"

Which must be deducted from back pay .Courts have traditionally recognized the separation between an employer and employee with respect to unemployment insurance benefits. :( Marshall Field and Co.

V. NLRB, 318 US 253, reh den 318 US 802; NLRB v. Gullett Gin Co. 340 ; Matter of Cassaretakis; 263 AD 773 rev'd 289 NY 119,aff'd 319 US 306.).

As the United States Supreme Court stated in Marshall Field and Co. v. NLRB (per curiam) "In this case the Labor Board ordered petitioner to compensate certain of its employee for loss of pay. Suffered as a result of their discriminatory discharge in violation of the National Labor Relation Act, 29 U.S.C.A. 151 et seq. Paragraph 2(b) of the order directed that petitioner make whole the employees by payment to them of a sum 'equal' to that which they would normally have earned as wages' during the specified period, less their 'net earnings during the period.'"

The United States Supreme Court went further in Marshall Field and Co. v. NLRB and stated : " we agree with the court below that the benefits under the state compensation act were plainly not earnings ' which under the terms of the board's order be deducted from back pay awarded."

The Marshall Field v. NLRB case was a appeal from the Seventh Circuit hat ask the United States Supreme Court whether unemployment could be deducted from back pay awards. Nelson's collective Bargaining agreement states the decision shall be final and binding upon both parties. ( see memorandum decision and order pg. 11. Justice Cogan on Article 13 of CBA).

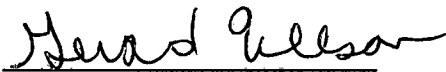
As a result of this procedural posture in Nelson not given any discovery on the merits or remanding the case back to state court. Both Courts acted well Beyond its judicial authority and contravened controlling Supreme Court precedents by basing its reasoning on its own view of the merits.

MVT and the Union breach the contract and the union breached its duty of fair representation by deducting Nelson unemployment and never reporting the taxes. The private settlement ( back pay agreement) never made Nelson whole this was discriminatory, dishonest, arbitrary, , and Nelson's case was handled in a perfunctory fashion. See Delcostello v, Int'l Blvd. of Teamster, 462 U.s. 151,164 (1983) also Vaca v. Sipes 386 U.S. 171,190. (a union breaches it duty by acting in bad faith.).

### **CONCLUSION**

For the reason set forth above, as well as those contained in the petition for writ of certiorari, petitioner prays that this Court grant rehearing of the order of denial, vacate that order, grant the petition and review the decision and order, memorandum decision and order, and summary order below, or in the alternative GVR order.

Respectfully submitted,



Dated July 3, 2018

**Additional material  
from this filing is  
available in the  
Clerk's Office.**