

No. 17-933

In the Supreme Court of the United States

NEW ENGLAND REGIONAL
COUNCIL OF CARPENTERS,
Petitioner,

v.

CONNECTICUT IRONWORKERS EMPLOYERS
ASSOCIATION, INC. *ET AL.*,
Respondents.

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

**BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI**

RONALD C. GLADNEY*
PAUL C. HETTERMAN
HARTNETT GLADNEY
HETTERMAN, LLC
4399 Laclede Ave,
St. Louis, MO 63108
(314) 941-2406
rgladney@hghllc.net
phetterman@hghllc.net
Counsel for Respondents
**Counsel of Record*

**COUNTER STATEMENT OF
QUESTIONS PRESENTED; REFUTATION OF
PETITIONER'S QUESTIONS**

1. Whether Petitioner's Petition shows a clear split between circuits in questions presented.
2. Whether the Second Circuit Court of Appeals correctly ruled that subcontracting agreements between employers and a labor union, even though permitted generally by the construction industry proviso, 29 U.S.C. § 158(e), will not qualify for the implicit exemption to antitrust laws if their enforcement goes beyond work preservation to acquire new work never previously performed by either the employer or the union and its members.
3. Whether the Second Circuit Court of Appeals erred and ruled that a violation of Labor Law removes a labor union's conduct from shelter under the implicit exemption for antitrust violations.
4. Whether the Second Circuit Court of Appeals correctly held that work assignments for work never previously performed by Petitioner's members in the geographic jurisdiction is in conflict with decisions of other Courts of Appeal in this regard.

5. Whether the Second Circuit Court of Appeals correctly held that labor unions have antitrust standing to sue other unions for their union members' lost employment opportunities in the labor market.

PARTIES TO THE PROCEEDING

Petitioner and Defendant New England Regional Council of Carpenters is the sole Defendant in this matter. Respondents and Respondent Labor Unions are Connecticut Ironworkers Employers Association, Inc.; MRS Enterprises, Inc.; Barrett, Inc.; Ernest Peterson, Inc.; Berlin Steel Construction Co.; Iron Workers Local No. 15, International Association of Bridge, Structural, Ornamental & Reinforcing, Iron Workers; Local 424, International Association of Bridge, Structural, Ornamental & Reinforcing; Sheet Metal Workers Local 38 Craft Training Fund; Sheet Metal Workers Local No. 40; International Union of Painters & Allied Trades District Council 11, AFL-CIO, CLC; International Union of Painters & Allied Trades District Council 11, AFL-CIO, CLC; International Union of Painters And Allied Trades Glaziers Local Union No. 1333; International Union of Painters and Allied Trades Glaziers Local Union No. 1274. The Respondent Employer Associations and Employers are all employers who are not generally signatory to the New England Regional Council of Carpenters and are adversely impacted by the enforcement of subcontracting provisions intended to expand work rather than to preserve work previously within the jurisdiction of the New England Regional Council of Carpenters.

TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF QUESTIONS PRESENTED; REFUTATION OF PETITIONER'S QUESTIONS	i
PARTIES TO THE PROCEEDING	iii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	v
INTRODUCTION	1
STATEMENT OF THE CASE	4
REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI	6
QUESTION 1: Whether Petitioner's Petition shows a clear split between the circuits in questions presented	6
QUESTION 2: Whether the Second Circuit Court of Appeals correctly ruled that subcontracting agreements between employers and a labor union, even though permitted generally by the construction industry proviso, 29 U.S.C. 158(e), will not qualify for the implicit exemption to antitrust laws if their enforcement goes beyond work preservation to acquire new work never previously performed by either the employers or the union and its members	8

QUESTION 3: Whether the Second Circuit Court of Appeals erred and ruled that a violation of Labor Law removes a labor union's conduct from shelter under the implicit exemption for antitrust violations	10
QUESTION 4: Whether the Second Circuit Court of Appeals correctly held that work assignments for work never previously performed by Petitioner's members in the geographic jurisdiction is in conflict with decisions of other Courts of Appeal in this regard	12
QUESTION 5: Whether the Second Circuit Court of Appeals correctly held that labor unions have antitrust standing to sue other unions for their union members' lost employment opportunities in the labor market.....	13
CONCLUSION	14

TABLE OF AUTHORITIES

	Page
CASES	
<i>A.L. Adams Constr. Co. v. Georgia Power Co.</i> , 733 F.2d 853 (11th Cir. 1984), cert. denied, 471 U.S. 1075 (1985).....	7
<i>Associated General Contractors v. Carpenters</i> , 459 U.S. 519 (1983).....	13, 14
<i>Connecticut Ironworkers Employers Association, Inc., et al. v. New England Regional Council of Carpenters</i> , 869 F.3d 92 (2d Cir. 2017)	1, 4-5, 8, 10
<i>Fibreboard Paper Products Corp. v. NLRB</i> , 379 U.S. 203 (1964).....	1, 8, 11, 12
<i>International Longshore & Warehouse Union v. ICTSI Or., Inc.</i> , 863 F.3d 1178 (9th Cir. 2017)	2, 3
<i>Local 210, Laborers' International Union of North America v. Labor Relations Division Associated General Contractors of American, N.Y.S. Chapter, Inc.</i> , 844 F.2d 69 (2d Cir. 1988)	1, 5, 8, 9, 10, 11
<i>Sun-Land Nurseries, Inc. v. California Dist. Council of Laborers</i> , 793 F.2d 1110 (9th Cir. 1986), cert. denied, 479 U.S. 1090 (1987).....	7, 10

<i>United Mine Workers v. Pennington</i> , 381 U.S. 657 (1965).....	7
<i>United Rentals Highway Techs., Inc. v. Indiana Constructors, Inc.</i> , 518 F.3d 526 (7th Cir. 2008).....	6

STATUTES

29 U.S.C. § 158	i, 1, 3, 4, 6, 7, 8
-----------------------	---------------------

INTRODUCTION

Several Salient Points and Differences

Several salient points are not mentioned by the New England Regional Council of Carpenters (hereinafter sometimes referred to as “Petitioner” or “Carpenters”) in its Petition for a Writ of Certiorari. To begin with, many of the cases cited by Petitioner do not involve interpretation of the construction industry proviso of 29 U.S.C. § 158(e). As such, the Petitioner does not uniformly recognize the impact which the interplay of § 8(e) and the antitrust laws have on this matter. Secondly, Petitioner fails to note that the Second Circuit Opinion in *Connecticut Ironworkers Employers Association, Inc., et al. v. New England Regional Council of Carpenters*, 869 F.3d 92 (2d Cir. 2017) deals with the interpretation of the court in the Second Circuit case of *Laborers Local 210, Laborers’ International Union v. Labor Relations Division, Associated General Contractors of America*, 844 F.2d 69 (2d Cir. 1988). The Second Circuit correctly emphasized the fact that the New England Regional Council of Carpenters nowhere disputed that their misuse of a subcontracting clause was to expand their work jurisdiction, to the exclusion of other trades unions, including Ironworkers, Glaziers, and Sheet Metal Workers, to work which the Carpenters had never historically performed. Petitioner misused its subcontracting clause for work expansion, beyond the appropriate use of such a clause for work preservation, and this ran afoul of *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 at 209 (1964), which noted that negotiation of a

subcontracting clause was appropriate if the clause was used in furtherance of a mandatory subject of bargaining – work preservation, and not work expansion. The Employers who were denied the opportunity to even bid on work which they had traditionally performed within the relevant geographic area, in some cases for more than 100 years, was not considered. Additionally, many of the cases cited by Petitioner involved collective bargaining agreements with parties to the collective bargaining agreements in those other cases in which parties to the collective bargaining agreements were challenging the legality of the agreements which they had signed. For example, in *ICTSI*, a case pending before this Court for determination as to whether a Writ of Certiorari should be granted, ICTSI itself was a party to the very collective bargaining agreement which it was challenging as violative of antitrust laws. *International Longshore & Warehouse Union v. ICTSI Or., Inc.*, 863 F.3d 1178 (9th Cir. 2017). Petition for Cert. filed, No. 17-770 (U.S. November 22, 2017). Other cases relied upon by Petitioner similarly involve parties to a collective bargaining agreement challenging the very collective bargaining agreement to which they are a party. Such is not the case here. Instead, this case involves the Carpenters’ attempt to usurp and preclude in an anticompetitive manner Respondent Employers and Respondent labor union members from performing work and competing for work, which Respondent employers and Respondent union members had performed exclusively until recently, to the exclusion of Carpenters.

The Petitioner does not seriously dispute the fact that with respect to the work in question on the job site, in accordance with 29 U.S.C. 158(e), the construction managers with whom the Carpenters are signatory never intended to perform the work themselves and always intended to subcontract that work, which Carpenters have traditionally never performed. Rather, the intent of Petitioner Carpenters was merely to exclude all competition from Respondent employers and Respondent labor unions to work which the Carpenters themselves had never performed within the relevant geographic area and which Respondent employers and Respondent labor union members had traditionally performed for decades.

The Petitioner also asserts within their Petition for Writ of Certiorari that this case should be consolidated and decided with the case of *International Longshore & Warehouse Union v. ICTSI Or., Inc.*, 863 F.3d 1178 (9th Cir. 2017). Such consolidation of these cases for consideration is totally inappropriate in that there are serious factual distinctions which would only serve to complicate the Court's decision making. To begin with, ICTSI was party to the Pacific Maritime Association Collective Bargaining Agreement, the enforcement of which it challenges as violating antitrust laws. None of the Respondents in this matter are challenging any collective bargaining agreement to which they are a party. Secondly, the *ICTSI* case involves an interpretation of a subcontracting agreement in a nonconstruction industry environment and, therefore, does not implicate the construction

industry proviso of 29 U.S.C. 158(e). By contrast, the case at bar involves only construction industry interpretation and implication of 29 U.S.C. 158(e), the construction industry proviso.

STATEMENT OF THE CASE

The case at issue involves litigation filed by Respondent unions and employers, along with Respondent pension funds (who were later dismissed at the District Court level, which dismissal was not challenged). The Respondents disputed particular jobs and proposed jobs, which reflected generally large construction projects and an assertion by the Carpenters that their signatory contractors would solely bid on and perform work which they had never performed before within the relevant geographic area. The employers in question, signatory to the Carpenters, had never performed the relevant work at issue within the relevant geographic area, and neither had members of the Carpenters Union.

The District Court decision in this case erroneously failed to consider the fact, when granting summary judgment, that neither the Carpenters nor their signatory employers had ever performed the work in question and that the construction industry proviso, while protecting subcontracting clauses which were in the nature of clauses to preserve work was historically not used to expand work jurisdiction definitions.

The Second Circuit Court of Appeals decision correctly in *Connecticut Ironworkers Employers*

Association, Inc., et al. v. New England Regional Council of Carpenters, acknowledged the fact that the Circuit's earlier opinion in *Local 210, Laborers' International Union of North America v. Labor Relations Division, Associated General Contractors of America, N.Y.S. Chapter, Inc.*, ("Local 210") sets forth the appropriate standard for determining the nonstatutory exemption and when it applies. This "two-part standard" reflects the conflicting policies in the labor and antitrust laws with the policies inherent in labor law serving as the initial point of reference. 869 F.3d at 106. In acknowledging the application of the *Local 210* standard, the court observed that, "First, the agreement at issue must further goals that are protected by national labor law and that are within the scope of traditionally mandatory subjects of bargaining." The Carpenters, in their argument, fail to adequately address even this initial point. The court further observed that the second point of the *Local 210* test was that the subcontracting agreement could not "impose a direct restraint on the business market [that] has substantial anticompetitive effects . . . that would not follow naturally from the elimination of competition over wages and working conditions . . ." 869 F.3d at 109.

Interestingly, the Petitioner lists "Questions Presented" in Petitioner's Petition for a Writ of Certiorari which are not even mentioned in the Argument Portion of the Brief. This adds further confusion to the purported rationale which Petitioner asserts. Nevertheless, Respondents structure their brief to refute the questions as presented by Petitioner.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

**QUESTION 1: Whether Petitioner’s Petition
 shows a clear split between the
 circuits in questions presented.**

Petitioner suggests that the Second Circuit’s holding creates a circuit split, contending that in the Seventh, Ninth and Eleventh circuits “but not in the Second Circuit, an agreement to that falls within the [construction industry] proviso [to Section 8(e)] precludes antitrust scrutiny.” Pet. At 16. The cases cited by Petitioner in support of that proposition in fact refute their position and do not support it.

In *United Rentals Highway Techs., Inc. v. Indiana Constructors, Inc.*, 518 F.3d 526 (7th Cir. 2008), the court first found that the subcontracting clause there at issue was protected by the construction industry proviso to Section 8(e). Turning to the Sherman Act claim, Judge Posner wrote:

*It might seem that since the hot cargo clause in the collective bargaining agreement is lawful under the National Labor Relations Act, it cannot violate the Sherman Act. But that is not correct, or at least not quite correct (a qualification that will become clearer as discussion proceeds). Section 8(e) does not say that hot cargo clauses are the cat’s meow. It just says they don’t violate the National Labor relations Act. * * * But they could*

violate something else, such as the Sherman Act, though not just by virtue of limiting competition in labor markets.

518 F.3d at 531. In example, the court explained that it could violate the Sherman Act if the employer association were the “cat’s paw” of employers who want to boycott low cost competitors.

Similarly, in *Sun-Land Nurseries, Inc. v. California Dist. Council of Laborers*, 793 F.2d 1110 (9th Cir. 1986 (en banc), cert. denied, 479 U.S. 1090 (1987), the court wrote:

We cannot accept the Laborers’ contention that, once an agreement is found to be within the construction industry proviso to Section 8(e), it is entirely and invariably beyond the reach of the Antitrust laws. We find a suggestion to the contrary in United Mine Workers v. Pennington, 381 U.S. 657 (1965).

793 F.2d at 1115.

Finally, there was no contention in *A.L. Adams Constr. Co. v. Georgia Power Co.*, 733 F.2d 853 (11th Cir. 1984), cert. denied, 471 U.S. 1075 (1985), that the subcontracting clause was being used for an illegitimate labor purpose. Rather, that case involved a project labor agreement between an employer and a coalition of all building trades unions that simply required all work, whether performed directly by Georgia Power itself or subcontracted, to be performed under union conditions. There was no

allegation that any union misused the clause for an improper purpose.

The Second Circuit's opinion here is in full accord with these opinions. As set forth *infra*, the court applied the two-part test adopted in *Local 210*. Turning to the first part of the test, the court noted that, under *Fibreboard Paper Prod. Corp. v. NLRB*, 379 U.S. 203, 209 (1964), subcontracting clauses that seek to preserve work traditionally performed by a union further a legitimate labor purpose. *Conn. Ironworkers* at 30-31, quoting *Local 210*, 844 F.2d 73 (emphasis added in *Conn. Ironworkers* opinion). Therefore, summary judgement dismissing the Sherman Act claim was improper because "the record is insufficient to determine whether or not these subcontracting clauses were in fact being used to preserve work, prevent jobsite friction, improve the wages, enhance working conditions, or further another legitimate labor goal; or whether the clause were used for work expansion – specifically whether the Carpenters used the subcontracting clauses to take over work that was traditionally done by Ironworkers." *Conn Ironworkers* at 32. That holding follows from settled law.

QUESTION 2: Whether the Second Circuit Court of Appeals correctly ruled that subcontracting agreements between employers and a labor union, even though permitted generally by the construction industry proviso, 29 U.S.C. 158(e), will not qualify for the

implicit exemption to antitrust laws if their enforcement goes beyond work preservation to acquire new work never previously performed by either the employers or the union and its members.

The cases cited by the Petitioner do, in fact, support Respondents' position. For example, the Second Circuit case of *Local 210, Laborers' International Union of North America v. Labor Relations Division Associated General Contractors of American, N.Y.S. Chapter, Inc.*, 844 F.2d 69 (2d Cir. 1988) states that in order to avoid antitrust law scrutiny an agreement must meet a two-part test. First, the agreement must further goals protected by the National Labor Relation laws and fall within the scope of mandatory subjects of bargaining; and second, the agreement must not impose direct restrictions on business that have substantial anticompetitive implications that would not fall naturally from the concept of negotiation over wages, and terms and conditions of employment. In this case, the asserted facts support the concept that neither element of the *Laborers' Local 210* test is met. First, the clause as enforced does not deal with a mandatory subject of bargaining in that the Petitioner Carpenters attempt to acquire new work never previously performed by either the contractors in question or the members of Petitioner Carpenters' union. The relevant work (generally "curtain wall"), in fact, has traditionally been performed only by Respondent unions and union members for decades

within the union construction industry in the relevant geographic area. Until the last few years, the Respondent Carpenters and its members have never performed the work in question and the general contractors and construction managers with whom the Carpenters' collective bargaining agreements are negotiated have never had Petitioner Carpenter members performing this work on job sites within the relevant geographic area. This, therefore, is totally inconsistent with the fact situation in the *Local 210* case and is, furthermore, inconsistent with the fact pattern in *Sun-Land Nurseries v. Southern California District Council of Laborers*, 793 F.2d 1110 (9th Cir. 1986). In both of these cases, there was no issue of work acquisition. Both cases involved use of a subcontracting clause for work preservation. There is, therefore, no split between the circuits on this question. Instead, there is consistency.

QUESTION 3: Whether the Second Circuit Court of Appeals erred and ruled that a violation of Labor Law removes a labor union's conduct from shelter under the implicit exemption for antitrust violations.

In its Petition for Writ of Certiorari, Petitioner mischaracterizes the holding in *Connecticut Ironworkers Employers Association, Inc., et al. v. New England Regional Council of Carpenters, supra*. The Second Circuit did not hold that a violation of labor law removes a labor union's conduct from shelter under the implicit exemption for antitrust violations. No such issue was even raised by the

parties in the underlying matter. Rather, the Second Circuit merely held that the nonstatutory exemption afforded by labor law to the Sherman Antitrust Act only applies when a mandatory subject of collective bargaining is involved. In this matter, since the Carpenters are attempting to use a limit on subcontracting for work acquisition, work which neither they nor their signatory contractors have ever performed in the relevant geographic area, that fact brings the Carpenters' conduct out from under the nonstatutory antitrust exemption. Had the Carpenters used the same subcontracting agreement only as a tool for preserving work which they had traditionally performed, a mandatory subject of bargaining would exist. The mandatory subject of bargaining would be a subcontracting provision to preserve work historically performed. But, since the Carpenters were attempting to use the subcontracting clause not to preserve work, but rather to expand their work and work jurisdiction to work never previously performed by Respondent Carpenter members, the justification provided in *Laborers' Local 210* does not apply.

As the Supreme Court noted in *Fibreboard, supra.*, in order for the imposition of a subcontracting clause to be a mandatory subject of bargaining, it must involve work preservation, not work acquisition or expansion. As Justice Warren noted in *Fibreboard*, "The primary issue is whether the 'contracting out' of work being performed by employees in the bargaining unit is a statutory subject of collective bargaining under those sections," *Fibreboard*, at 204-5. Here, the issues involved do not include such subcontracting

out of work previously performed by employees in the bargaining unit since employees in the bargaining unit had never performed the work in question. Consequently, as is characteristic throughout its petition, the Petitioner is painting the matter with too broad a brush. Were the use of the subcontracting clause in question merely to preserve work previously performed by Carpenters, it would be a mandatory subject of bargaining and the subcontracting clause could be protected. Such is not the case here.

QUESTION 4: Whether the Second Circuit Court of Appeals correctly held that work assignments for work never previously performed by Petitioner's members in the geographic jurisdiction is in conflict with decisions of other Courts of Appeal in this regard.

Again, Petitioner paints with too broad a brush when it claims that the Second Circuit Court of Appeals erred by ruling that work assignments are not mandatory subjects of bargaining. This case does not even involve work assignments, it involves the attempted imposition of a subcontracting clause to support the Carpenters' expanded jurisdiction, which is a definition of work they had never previously performed. Consequently, the *Fibreboard* analysis applies and since this is not a case of work preservation, but rather of misuse of a subcontracting clause for work acquisition, the nonstatutory exemption to the antitrust laws does not apply.

QUESTION 5: Whether the Second Circuit Court of Appeals correctly held that labor unions have antitrust standing to sue other unions for their union members' lost employment opportunities in the labor market.

Again, Petitioner paints with too broad a brush. Labor unions and employers in this case sued to protect their own historic work jurisdiction, which in some cases had existed for over 100 years, but also to ensure that customers and owners retain the right to select contractors and subcontractors on a nonexclusive basis. Were the Carpenters to prevail, they could expand their work jurisdiction without ever before having performed the work in question and there would be no limit to an endless expansion of their jurisdictional clauses through the misuse of subcontracting provisions in the future. While Respondent labor organizations are obviously interested in preserving their jurisdiction of work which their members have performed for decades, the Petitioner forgets that if it were to prevail, not only would it be the exclusive performer of such work in the union construction industry, but the ultimate consumers would have no say in the matter.

The issue in *Associated General Contractors v. Carpenters*, 459 U.S. 519 (1983), dealt directly with the question of whether a union had standing to obtain damages in an antitrust case. First, the Court noted that the issue of standing must be viewed on a case-by-case basis and is fact intensive. At no point

did the Court state a blanket proposition that unions could never have standing to file an antitrust case. In the case at bar, no Respondent Union requests or demands damages. Consequently, the issues of apportionment of damages and related issues of the indirect nature of damages occurring do not apply. Secondly, the Court conceded in *Associated General Contractors* that there may be an antitrust violation if properly pled. The Court did not conclude that under no circumstances did standing exist.

CONCLUSION

For the above-stated reasons and law, it is respectfully submitted that the Petitioner's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

/s/ Ronald C. Gladney

Ronald C. Gladney (Counsel of Record)

Paul C. Hetterman

Hartnett Gladney Hetterman, LLC

4399 Laclede Ave,

St. Louis, MO 63108

(314) 941-2406

rgladney@hghllc.net

phetterman@hghllc.net

February 28, 2018