High Court Labor Ruling Is A Ripple, Not A Sea Change

By **Rob Entin** (June 8, 2023)

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In the sword fight between King Arthur and the Black Knight in the film "Monty Python and the Holy Grail," the Black Knight tries to minimize the damage that King Arthur is inflicting.

When his left arm is severed, he exclaims, "Tis but a scratch." When King Arthur cuts off his right arm, the Black Knight yells, "Tis but a flesh wound." As the Black Knight's words are betrayed by our eyes, King Arthur ultimately crosses the bridge that the Black Knight was blocking to continue his journey toward Camelot.

It would be an overstatement to say that in the morning of June 1, employers crossed that bridge to Camelot. But a collective sigh of relief was heard throughout labor law land.

After two years of unfavorable decisions from the National Labor Relations Board and its general counsel, Jennifer Abruzzo, a proverbial bone was tossed management's way when the U.S. Supreme Court issued its June 1 decision in Glacier Northwest Inc. v. International Brotherhood of Teamsters Local 174. The court held that employers can pursue state court litigation against unions for intentional property damage.

In the 8-1 decision, Justice Amy Coney Barrett brushed aside the union's argument that the dispute was preempted by the National Labor Relations Act. Perhaps most surprising, two of the three liberal justices joined the majority decision, with Justice Kentaji Brown Jackson providing the lone dissent. It was a rebuke to organized labor, and specifically, its practice of engineering work stoppages during concrete pours.

But before employers start filing multiple state court lawsuits, a closer examination of the case and its ramifications is warranted. Does Glacier Northwest signify a sea change, where employers can avoid the NLRB and its political agenda and pursue property damages in state court?

Or is Glacier Northwest a mere flesh wound, narrowly construed to end a practice used only by some unions in the construction industry?

Upon further review, proclaiming that this case has far-reaching consequences beyond egregious, intentional misconduct may be a stretch.

The facts of Glacier Northwest were largely undisputed. The company delivers concrete to customers in Washington state using ready-mix trucks with rotating drums that prevent the concrete from hardening as they travel to job sites.

Concrete is a highly perishable product, and it hardens within a short amount of time after being mixed. While a rotating drum can prolong the inevitable for a few hours, failure to pour within a short amount of time will lead to the waste of the product. Should it harden in the mixing truck, it can cause tens of thousands of dollars of damage to the truck, on occasion rendering the vehicle unusable.

Unions have been aware of this process for decades, and in the construction industry, it is

not uncommon for a union to engineer a work stoppage at the site of concrete pour. Whether an economic recognition or unfair labor practice strike, the cost of wasted concrete — if not complete destruction of the ready-mix truck — has led many employers to resolve their differences with unions, if not voluntarily recognize them on the spot.

This strategy works because of the state courts' historical unwillingness to act due to preemption issues. The Supreme Court, in San Diego Building Trades Council v. Garmon in 1959, held that the courts "must defer to the exclusive competence" of the NLRB in activity arguably subject to the NLRA. Unlike the principle that federal law trumps state law when the two conflict, under Garmon, federal and state law are trumped by NLRB law when they arguably conflict.

In Glacier Northwest, a Teamsters local union engineered a work stoppage once the trucks were loaded and en route to the jobsite. Drivers refused to deliver concrete; some returned the trucks back to the shop, others abandoned them. This led to a scramble for the employer, who had to find a way to safely dispose of the concrete before the trucks were ruined. The concrete itself was destroyed.

The company sued the union in state court, alleging conversion and trespass to chattel. The union filed a motion to dismiss, based on Garmon preemption, which the trial court granted. Although the appellate court reversed, the Washington Supreme Court agreed with the trial court and found the dispute preempted. The U.S. Supreme Court granted certiorari and found for the employer.

The majority concluded that Garmon preemption was inappropriate under these circumstances. Key to this determination was the NLRB's longstanding position that the act

> does not shield strikers who fail to take "reasonable precautions" to protect their employer's property from foreseeable, aggravated and imminent danger due to the sudden cessation of work.

Justice Barrett concluded that by the sudden cessation of work, the union and its members knew that it placed the company's property in foreseeable and imminent danger. As such, Garmon preemption was unwarranted, and the state court should decide whether such actions rise to the level of conversion or trespass to chattel.

A surface reading of Glacier Northwest would lead to the conclusion that this is a huge victory for employers. Unions who engage in intentional property destruction can be sued in state court. Gone is the notion that the NLRB will give a pass to unions so long as they can point to the exercise of rights under the act.

But while it may be easier for employers to get to discovery and withstand a motion to dismiss now, there is some reason to pump the brakes on whether this indicates a change in how the Supreme Court views employer property damage during work stoppages.

In this case, the court really was bothered by the union's actions. Justice Barrett did not mince words when pointing out that the right to strike was not absolute, rejecting the union's request for the court to extend a generous interpretation of the NLRA's allowance of the right to strike.

The majority also torpedoed the union's argument that equated "timing" with "lack of notice." While the court agreed that the lack of notice did not "render its conduct unprotected," it still found that the union "failed to take reasonable precautions to avoid

foreseeable, aggravated, and imminent harm to Glacier's property" by calling for the strike "after its drivers had loaded a large amount of wet concrete into Glacier's delivery trucks."

Justice Barrett suggested that the union

> could have initiated the strike before [the company's] trucks were full of wet concrete — say, by instructing drivers to refuse to load their trucks in the first place.

In other words, the timing of the strike, rather than the lack of notice to the employer, led to the strike being unprotected, and thus, not a candidate for Garmon preemption.

The court stopped short, however, of declaring that destruction of property generally, or perishable goods specifically, is per se unlawful. The union cited a number of cases where the NLRB found a work stoppage protected, where there was a spoliation of goods, including raw poultry, milk and cheese. Teamsters opined that

> if the mere risk of spoilage is enough to render a strike illegal … workers who deal with perishable goods will have no meaningful right to strike.

It appears that the Supreme Court agreed, even if it did not say so in the decision. Instead of creating a blanket rule where destruction of property, perishable goods or not, can lead to state court damages, the court declined to extend its holding beyond the instant case.

Although dismissive, characterizing it as the union "swinging at a straw man," the court accepted the union's distinction of cases where there were consequences, as they relate to poultry, milk and cheese, and one where the union "prompted creation of the perishable product," as with the concrete.

In other words, the Supreme Court will distinguish between conduct in which property is destroyed as a byproduct of the work stoppage and one where the union targets and intends for property to be destroyed.

This seems like a distinction without a difference, leaving practitioners and their clients without much guidance beyond those dealing with concrete, or in other obvious situations such as where strikers "abandoned their posts without warning 'when molten iron in the plant cupola was ready to be poured off,'" as found by the U.S. Court of Appeals for the Fifth Circuit in the 1955 case of NLRB v. Marshall Car Wheel & Foundry Co.[1]

While the practice of engineering work stoppages immediately prior to a concrete pour will need to stop, it is hard to read this case as suggesting that property damage, in and of itself, can lead to state court damages.

While litigants may be able to survive motions to dismiss and get to the discovery phase of litigation more easily, Garmon preemption still will be the likely result where union actions are not objectively egregious or the union can demonstrate that it took some minimal precautions to avoid property damage, even if ultimately futile.

Perhaps that is why both Justices Clarence Thomas and Samuel Alito drafted separate concurrences that took aim at Garmon preemption and why the court has been so deferential to the NLRB. Justice Thomas opined:

> The majority opinion today underscores the strangeness of the Garmon regime … The Court does so, not based on its own judgment that federal law does not pre-

empt the claim, but because the NLRB's existing precedents adequately remove any "[c]lou[d]" over the matter.

He suggests that although the "parties here have not asked us to reconsider Garmon," the court should do so in an appropriate case.

In sum, Glacier Northwest should stop the practice of striking concrete pours; unions will risk liability should they continue to do so. Cases where there is an egregious and clear intention to destroy company property likely will lead to state court damages. State courts may be more likely to deny motions to dismiss based on this ruling, should employers plead that unions took no reasonable precautions to avoid property damage.

A recalibration of the balance between employer property rights and the union's right to strike, though, is doubtful. That seismic change may only occur when a case truly challenges Garmon preemption.

Then, and only then, will employees be able to pass the Black Knight and continue on their journey to Camelot.

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[1] NLRB v. Marshall Car Wheel & Foundry Co., 218 F.2d 409 (1955).