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TO: MTA Governance
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FROM: Rebecca Yee, MTA General Counsel

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RE: Legal Advisory: SCOTUS on *Glacier Northwest v. Teamsters*

Last week, the Supreme Court of the United States (SCOTUS) issued another setback to workers and organized labor in *Glacier Northwest, Inc. v. International Brotherhood of Teamsters*, revealing the highest court's priority of property over people. SCOTUS modified a decades-long precedent that employers generally cannot sue unions in state court over actions under federal jurisdiction that are covered by the National Labor Relations Act (NLRA). Although this decision may encourage duplicative lawsuits from employers for property damage caused by strikes, which could chill union activity and complicate attempts by employees to win fair contracts, it is critical to keep in mind that, essentially, the law has not changed in determining whether a strike is protected under federal labor law. *Indeed, private sector workers are still entitled to the fundamental right to strike*, including the ability to time strikes for maximum effect, as the National Labor Relations Board ("the Board") has long recognized that economic losses are a common byproduct of protected labor disputes. See *Leprino Cheese Mfg. Co.*, 170 NLRB 601 (1968).

I. Background of *Glacier Northwest v. Teamsters*

Glacier Northwest is a concrete company that uses mixing trucks to make and deliver ready-mix concrete in Washington State. Teamsters Local Union No. 174 ("Union") is the exclusive bargaining agent for Glacier's truck drivers. The two parties were engaging in negotiations for a successor contract in the summer of 2017 when the Union called for a work stoppage on August 11. According to Glacier, the Union timed their strike to commence after the trucks were already filled with wet concrete, which could cause significant damage to the trucks if the concrete hardened before removal. Glacier was able to remove the hardening concrete before it damaged the trucks, however, it was forced to dispose all the pre-mixed concrete entirely.

In attempt to recover damages for the unusable and disposed concrete, Glacier sued the Union in state trial court, claiming that the Union *intentionally* destroyed the concrete in violation of the Union's duty to take reasonable precautions to protect the employer's property from "foreseeable, aggravated, and imminent danger" due to the sudden cessation of work. See *NLRB v. Marshall Car Wheel and Foundry Co.*, 218 F.2d 409 (5th Cir. 1955) (strike unprotected when employees abandoned their posts without warning "when molten iron in the plant cupola was ready to be poured off"). However, a long line of federal labor law cases protects strike activities, even when the strike had led to the spoiling of perishable goods, for example, from a temporary closure of a store or factory or when workers

walk off the job while tending to a perishable item.[1] In fact, the Board's position is that indefinite losses must be weighed against strikers' legitimate concerns regarding their working conditions and pay; and "[a]side from stopping work the employees here did nothing affirmatively to cause physical damage to Respondent." *Lumbee Farms Coop.,* 285 NLRB 497, 506 (1987). The Union argued in *Glacier* that, if the mere risk of spoilage is enough to render a strike illegal, then workers who deal with perishable goods will have no meaningful right to strike.

Accordingly, the state trial court dismissed the case on the ground that federal labor law preempted it, and even though the Washington Supreme Court agreed with the state court's ruling, SCOTUS granted review, overturned the dismissal, and remanded the case to state court for a new trial. Based on the majority opinion written by Justice Amy Coney Barrett, she distinguishes the line of labor law cases related to perishable goods with the belief that the Union's actions demonstrated an intention to destroy the employer's property (e.g. trucks), by prompting "the creation of the perishable product" before walking off the job, which the court majority believed was a foreseeable, aggravated, and imminent harm that the Union had an affirmative duty to take reasonable precautions to prevent. Justice Barrett reasoned that if such conduct was true, the Union would lose the protection under the NLRA, and therefore Glacier's claim would not be preempted by federal law. Rather, the employer would retain its right under common law to sue for tort damages.

In a sole dissenting opinion, Justice Ketanji Brown Jackson emphasized the long-established preemption rule under *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), in which "a court presented with a tort suit based on strike conduct generally must pause proceedings and permit the Board to determine in the first instance whether the union's conduct is lawful if the conduct at issue is even 'arguably' protected by the NLRA." *Id.,* at 245. In the *Glacier* matter, the general counsel of the Board, after a thorough factual investigation, had filed a complaint against Glacier, alleging that the NLRA protects the strike conduct of the Union. Justice Jackson used this action by the Board to state,

> "*But instead of modestly standing down, the majority eagerly inserts itself into this conflict, proceeding to opine on the propriety of the union's strike activity based on the facts alleged in the employer's state-court complaint. As part of this mistaken expedition, the majority tries its own hand at applying the Board's decisions to a relatively novel scenario that poses difficult line-drawing questions—fact-sensitive issues that Congress plainly intended for the Board to address after an* investigation*. And in the course of inappropriately weighing in on the merits of those questions at this stage, the majority also misapplies the Board's cases in a manner that threatens to both impede the Board's uniform development of labor law and erode the right to strike.*" [2]

Justice Jackson continued to argue vigorously, in a 27-page dissent, that the Court should have followed the preemption rule in *Garmon* and allowed the Board – "armed with its own procedures, and equipped with its specialized knowledge and cumulative experience" in labor law – to adjudicate this case rather than by the state court.

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[1] See, e.g., *Lumbee Farms Coop*., 285 N. L. R. B. 497 (1987) (raw poultry processing workers), enf 'd, 850 F. 2d 689 (CA4 1988*); Central Oklahoma Milk Producers Assoc*., 125 N. L. R. B. 419 (1959) (milk-truck drivers), enf 'd, 285 F. 2d 495 (CA10 1960); *Leprino Cheese Co.*, 170 N. L. R. B. 601 (1968) (cheese factory employees), enf 'd, 424 F. 2d 184 (CA10 1970).

[2] 21-1449 *Glacier Northwest, Inc. v. Teamsters* (06/01/2023) at pg. 23.

II. Impact on Organized Labor

While it's clear that the *Glacier* decision oversteps the authority of an administrative agency and attempts to quell strike activity by creating more liability for striking workers and labor unions, the general legal standards around federal preemption and the right to strike have not changed from this narrow ruling based on very specific facts of the case. Although striking labor unions should be mindful to prevent foreseeable and imminent danger to the employer's physical property, such as equipment like the mixing trucks, the rights of private sector workers to time strikes for maximum effect is still preserved even when economic losses occur from halting services or product spoilage. Thus, even though this decision resulted from coordinated efforts to chip away at the rights of workers and unions, it seems like *Glacier* will have minimal impact on labor law.

More concerning than the contours of the majority decision is the concurrences by Justices Alito, Thomas, and Gorsuch, all of whom have suggested that the preemption rule in *Garmon* should be carefully reexamined – an action that will certainly threaten to "impede the Board's uniform development of labor law and erode the right to strike," as stated by Justice Jackson in her dissent. Without *Garmon*, a labor union might simultaneously win a decision at the Board holding that it had a right to strike, while also losing a lawsuit in state court claiming that a union acted unlawfully. That would mean twice the legal fees for the union, and a confusing mix of contradictory labor law decisions that will be ultimately decided by a highly politicized U.S. Supreme Court. To counter this, labor advocates have suggested bringing more workers into every step of the collective bargaining process to build commitment and solidarity for strike activity. Moreover, unions can preemptively propose contract language that includes an explicit waiver of the employer's right to take any tortious claims to court.

III. The Good Fight Continues

While it is true that the G*lacier* decision will not impact MTA or other public sector unions in Massachusetts, because: (1) the NLRA applies only to private sector workers, and (2) strikes are unlawful in the Commonwealth, this decision has alarming significance as it is yet another reversal by SCOTUS in series of longstanding legal precedent that favors workers and labor unions at a time when unionization and strikes are becoming increasingly frequent and favored. Although this trend by the highest court is disconcerting, workers understand that the power and solidarity of the collective, and the willingness to strike even when illegal or with restrictions, have generated stronger contracts and enhanced wages and working conditions by leveling the playing field with employers. Withholding labor is simply the most potent and formidable economic tool for workers.

"*American [private sector] workers must remember that their right to strike has not been taken away*," said Teamsters President Sean O'Brien in response to the ruling. He continues:

> *"The Teamsters will strike any employer, when necessary, no matter their size or the depth of their pockets. Unions will never be broken by this Court or any other.*
>
> *Today's shameful ruling is simply one more reminder that the American people cannot rely on their government or their courts to protect them. They cannot rely on their employers.*
>
> *We must rely on each other. We must engage in organized, collective action. We can only rely on the protections inherent in the power of our unions.*"