Case Nos. 17-3851, 17-3860

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOSEPH ZINO, JR., DONALD R. HINER, ROGER N. KNOP,
GEORGE WATTS, and RUTH WADE,
on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees

v.

WHIRLPOOL CORPORATION and
WHIRLPOOL CORPORATION GROUP BENEFITS PLAN FOR RETIREES,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Ohio
Case No. 5:11-cv-01676

BRIEF AMICI CURIAE OF UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO-CLC and INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA IN SUPPORT OF PLAINTIFFS-APPELLEES

April 12, 2018

Maneesh Sharma
Assistant General Counsel, USW
60 Blvd of the Allies, Room 807
Pittsburgh, PA 15222
msharma@usw.org
412-562-2531

Carlos F. Bermudez
Associate General Counsel, UAW
8000 E. Jefferson Ave.
Detroit, MI 48207
cbermudez@uaw.net
313-926-5216

Counsel for *Amici Curiae*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTERESTS OF THE *AMICI CURIAE*

The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC ("USW") is an unincorporated labor organization that represents 850,000 North American workers across various industries, many of whom are located within the jurisdiction of this Court. The USW also actively represents and engages its retiree population, which numbers at least in the hundreds of thousands. For instance, since 1985, the USW has maintained the Steelworkers Organization for Active Retirees ("SOAR"). SOAR focuses on the unique issues impacting USW retirees and their spouses, and engages in efforts to assure security for current and future generations of retirees.

The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America ("UAW") is an unincorporated labor organization that represents 430,000 workers across various industries, many of whom are also located within the jurisdiction of this Court. UAW retirees number over a million, with many located within this Circuit.

Amici have negotiated numerous collective bargaining agreements that provide retiree health benefits for their current and future retired members. These retiree benefits are of great importance to *amici*'s retired members. *Amici* have a strong interest in ensuring that collective bargaining agreements, particularly in

retiree benefits litigation, are interpreted consistent with federal labor policy, and not through an improper exaltation of explicit terms or application of artificial rules of construction, and as such, *amici* have a strong interest in the outcome of this case.[1]

INTRODUCTION

The Supreme Court recently made clear that courts are to "interpret collective-bargaining agreements… according to ordinary principles of contract law, at least when those principles are not inconsistent with federal labor policy." *M & G Polymers USA, LLC v. Tackett*, 135 S.Ct. 926, 933 (2015). Courts are to examine "explicit terms, implied terms, [and] industry practice," *CNH Industrial N.V. v. Reese*, 138 S.Ct. 761, 765 (2018) (citing Ginsburg, concurrence, *Tackett*), to "ascertain the intention of the parties." *Tackett*, 135 S.Ct. at 935 (italics omitted). Thus, in applying ordinary principles of contract interpretation that are consistent with federal labor policy, a court may not disregard "implied terms" and "industry practice" – and rely solely on the "explicit terms" of individual collective bargaining agreements – to "ascertain the intention of the parties." As explained below, interpretative principles that exalt "explicit terms" over all else would be "inconsistent with federal labor policy."

[1] This brief is submitted pursuant to Rule 29(a). All parties have consented to its filing. No party or party's counsel authored this brief in whole or in part; no party or party's counsel contributed money to fund the preparation or submission of this brief; and no other person except *amici curiae* contributed money intended to fund the preparation or submission of this brief.

ARGUMENT

I. Federal Labor Policy Pressures Employers and Unions to Reach Agreement to Avoid Labor Strife

"[A] collective bargaining agreement is not an ordinary contract." *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 550 (1964). "When most parties enter into contractual relationship they do so voluntarily, in a sense that there is no real compulsion to deal with one another, as opposed to dealing with other parties. This is not true of the labor agreement." *United Steelworkers of Amer. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 580 (1960). "Central to the peculiar status and function of the collective bargaining agreement is the fact, dictated by both circumstance,… and by the requirements of the National Labor Relations Act, that it is not in any real sense the simple product of a consensual relationship." *John Wiley & Sons*, 376 U.S. at 550.

The National Labor Relations Act ("NLRA"), 29 USC § 151 et seq, requires an employer to engage in good faith collective bargaining with the certified representative of its employees. 29 U.S.C. §§ 158(d) and (a)(5). "[T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement." 29 U.S.C. § 158(d). By imposing this duty to meet and confer in good faith, Congress intended to "encourage an attitude of

settlement through give and take." *NLRB v. Ins. Agents' Int'l Union, AFL-CIO*, 361 U.S. 477, 488 (1960).

Ultimately, "the policy of Congress" embodied in the NLRA "is to impose a mutual duty upon the parties to confer in good faith with a desire to reach agreement." *Ins. Agents' Int'l Union, AFL-CIO*, 361 U.S. at 488. "[T]he history of the collective bargaining process show[s] that its object has long been an agreement between employer and employees as to wages, hours and working conditions evidence by a signed contract or statement in writing." *H.J. Heinz Co. v. NLRB*, 311 U.S. 514, 524 (1941).

> Collective bargaining, then, is not simply an occasion for purely formal meetings between management and labor, while each maintains an attitude of 'take it or leave'; it presupposed a desire to reach ultimate agreement, to enter into a collective bargaining agreement. This was the sort of recognition that Congress, in the [NLRA], wanted extended to labor unions; recognition as the bargaining agent of the employees in a process that looked to the ordering of the parties' industrial relationship through the formation of a contract.

Ins. Agents' Int'l Union, AFL-CIO, 361 U.S. at 485 (internal citations omitted).

Though federal labor policy encourages the parties to enter into agreements, the Act explicitly "does not compel either party to agree to a proposal or require the making of a concession." 29 U.S.C. § 158(d). And while Congress hoped that imposing a mutual duty to meet and confer in good faith would lead to settlement of differences through give and take at the bargaining table, "[t]he [collective

bargaining] system has not reached the ideal of the philosophic notion that perfect understanding among people would lead to perfect agreement among them on values." *Ins. Agents' Int'l Union, AFL-CIO*, 361 U.S. at 488-9. Therefore, "[t]he presence of economic weapons in reserve, and their actual exercise on occasion by the parties, [remains] part and parcel of the system." *Id.* at 489.

Due to the National Labor Relations Act's dictates that a company and union bargain in good faith while maintaining use of their economic weapons, the parties'

> choice is generally not between entering or refusing to enter into a relationship, for that in all probability preexists the negotiations. Rather, it is between having that relationship governed by an agreed-upon rule of law or leaving each and every matter subject to a temporary resolution dependent solely upon the relative strength, at any given time, of the contending forces.

Warrior & Gulf, 363 U.S. at 580. Federal labor policy promotes settlement of collective bargaining agreements as those agreements "stabiliz[e] labor relations and prevent[], through collective bargaining, strikes and industrial strife." *H.J Heinz*, 311 U.S. at 524.

Federal labor policy, accordingly, places enormous pressure on employers and unions to reach an agreement. Over 65 years ago, the eminent arbitrator and father of the study of industrial relations Prof. George W. Taylor effectively explained the pressure inherent in federal labor policy for parties to reach a collective bargaining agreement, which renders the collective bargaining agreement a unique instrument:

> The collectively-bargained labor agreement, however, must be distinguished from the usual commercial contract. It is an agreement specifying the conditions under which the services of individuals will be contracted for. But, another characteristic of the labor agreement makes it unique. There can be no failure to consummate a labor agreement. There must be a meeting of the minds. Unlike most other contractual relationships, the parties cannot eliminate the gulf between them by the simple expedient of refusing to do business with each other. They must do business; they must arrive at a meeting of the minds.
>
> ***
>
> A desire of workers and management alike to avoid the risks and the costs of work stoppages is a strong motive power for bringing about the modification of extreme positions which is necessary if mutual understandings are to evolve – and they must evolve. Without a strong inducement for both parties to "make concessions," agreement would be less likely.
>
> ***
>
> A meeting of the minds – mutual acceptability of terms of employment – is deemed to be so vital that, under collective bargaining, each party is accorded the right to stop production. Why? As a means of exerting ultimate pressures for a modification of extreme positions to the extent necessary to make an agreement possible.

Taylor, *The Voluntary Arbitration of Labor Disputes*, 49 Mich. L. Rev. 787, 789-90 (1951).

The various pressures on the parties create a "compulsion to reach agreement." *Warrior & Gulf*, 363 U.S. at 580. This compulsion often requires the parties to find an acceptable verbal formula, usually the minimal words necessary, to express the intent of the parties. Time pressures and the inability to predict all

issues that inevitably arise out of the collective bargaining agreement further create gaps in express terms.

Fealty to a strict reading of only explicit terms of a collective bargaining agreement undermines the federal labor policy that applies pressures to the parties to encourage compromise on acceptable language, in an effort to avoid labor strife. This is why the Supreme Court has consistently instructed courts to look beyond the explicit terms of the provision in question when examining collective bargaining agreements. *See, e.g.*, *Reese*, 138 S.Ct. at 765 (examine "explicit terms, implicit terms, [and] industry practice") (citing Ginsburg, concurrence, *Tackett*); *Tackett*, 135 S.Ct. at 937-8 ("a court must examine the entire agreement in light of relevant industry-specific customs, practices, usages, and terminology" as well as "implied terms") (Ginsburg, concurrence) (internal quotations and citations omitted); *Litton Financial Printing Div., Litton Bus. Systems, Inc. v. NLRB*, 501 U.S. 190, 203 (1991) (rights may vest though "express or implied" terms); *Consolidated Rail Corp. v. Railway Labor Executives' Assn.*, 491 U.S. 299, 311 (1989) ("collective-bargaining agreements may include implied, as well as express, terms"); *Warrior & Gulf*, 363 U.S. at 582 ("the practices of the industry and the shop [] is equally a part of the collective bargaining agreement although not expressed in it").

II. The Supreme Court has Applied Principles of Contract Interpretation, Consistent with Federal Labor Policy, that Require an Examination of More than Just Explicit Terms of Collective Bargaining Agreements

Over the years, the Supreme Court has provided significant guidance to courts on how to apply principles of contract interpretation, consistent with federal labor policy, without improperly exalting the explicit terms of the agreement. Below are some principles the Supreme Court has instructed courts to apply when interpreting a collective bargaining agreement.

The concurrence in *Tackett*, later cited by the *per curium* decision in *Reese*, reminded lower courts of the importance of "examin[ing] the entire agreement." 135 S.Ct. at 938. It then offered examples to illustrate this inquiry. First, "a provision stating that retirees 'will receive' health-care benefits if they are 'receiving a monthly pension' is relevant to th[e] examination" of the entire agreement to determine whether the parties intended retiree healthcare benefits to vest. *Ibid*. Second, "is a 'survivor benefits' clause instructing that if a retiree dies, her surviving spouse will 'continue to receive [the retiree's health-care] benefits… until death or remarriage" is also relevant to the vesting inquiry. *Ibid*. Thus, the nature of collective bargaining agreement requires courts to look at the entire document for guidance as to the parties' true intent with any given provision.

Additionally, the Supreme Court has instructed courts not to read related collective bargaining agreements in isolation, but to read them together.

Transportation-Communications Employees Union v. Union Pac. R. Co., 385 U.S. 157, 162 (1966) ("In order to interpret [a collective bargaining] agreement it is necessary to consider the scope of other related collective bargaining agreements."). In *Carbon Fuel Co. v. United Mine Workers of Amer.*, the Supreme Court informed its reading of a disputed provision in the collective bargaining agreement in dispute by looking to the "bargaining history" of that provision in previous agreements. 444 U.S. 212, 219-20 (1979). Accordingly, the Supreme Court acknowledged that successive collective bargaining agreements are bargained in the shadows of and informed by the agreements that precede it, and agreements within the series of agreements may offer guidance as to the parties' intent within any other agreement in the series.

The Supreme Court further instructed courts that, when interpreting collective bargaining agreements, "special heed should be given to the context in which collective bargaining agreements are negotiated and the purpose which they are intended to serve." *United Steelworkers of Amer. v. American Mfg. Co.*, 363 U.S. 564, 567 (1960). This is especially so as collective bargaining agreements "call into being… the common law of a particular industry or of a particular plant," and this "common law of the shop implements and furnishes the context of the agreement." *Warrior & Gulf*, 363 U.S. at 579, 580. Similarly, "it is well established that the parties' 'practice, usage and custom' is of significance in

interpreting their [collective bargaining] agreement." *Consolidated Rail Corp.*, 491 U.S. at 311 (citing *Transportation-Communication Employees Union*, 385 U.S. at 161).[2] Thus, the Court recognized that, due to the nature of collective bargaining agreements, "[g]aps may be left to be filled in by reference to the practices of the particular industry and of the various shops covered by the agreement." *Warrior & Gulf*, 363 U.S. 580.

Ultimately, the Supreme Court has stated that, when interpreting collective bargaining agreements consistent with federal labor policy, courts must examine not only "explicit terms," but also must look to such things as "implicit terms," "industry practice," "related collective bargaining agreements," "bargaining history," the "context" in which the agreements are negotiated, the "purpose" the agreements are intended to serve, and the "parties' practice, usage, and custom." Such an analysis forecloses mechanical applications of interpretative rules that may undermine the federal labor policy of encouraging agreement over labor strife,

[2] The relevance of the "parties' practice" is a long recognized principle of contract interpretation. *See*, *Brooklyn Life Ins. Co. v. Duther*, 95 U.S. 269, 273 (1877) ("There is no surer way to find out what parties meant, than to see what they have done."); *Old Colony Trust v. City of Omaha*, 230 U.S. 100, 118 (1913) (the "practical interpretation of a contract by the parties to it for any considerable period of time before it comes to be the subject of controversy" is of "great, if not controlling, influence"); *Alabama v. North Carolina*, 560 U.S. 330, 346 (2010) ("the parties' course of performance" is "highly significant" evidence of their contractual intentions.). This principle is especially important when applied in the collective bargaining context. Due to the nature of collective bargaining agreements discussed above, the parties' actual conduct under the accepted verbal formula is highly instructive of the parties' intent.

such as a clear and express statement rule or simply applying a general durational clause unless the agreement explicitly says otherwise.

Tackett reinforced that courts may not short-circuit this analysis, for fear of displacing a finding of the parties' intent based on "record evidence" with a court's "own suppositions about the intentions of employees, unions, and employers negotiating retiree benefits." 135 S.Ct. at 935. This is especially so because "federal labor policy [would be] threatened by the interposition of artificial rules of construction upon the parties' mutual intent" as

> [a] grudging or stilted interpretation of collective bargaining agreements tends to encroach upon the fundamental national policy favoring the ordering of the employer-employee relationship by voluntary bargaining rather than governmental fiat.

Local Union 1395, Int'l Broth. of Electrical Workers v. NLRB, 797 F.2d 1027, 1031 (D.C. Cir. 1986). Such artificial rules of construction would "limit the enforceability of [] contract terms" and "impermissibly… pass upon the desirability of the substantive terms of labor agreements by affording [such] terms a less favored status." *Consolidated Rail*, 491 U.S. at 309 (internal quotations and citations omitted).

CONCLUSION

The district court properly employed an analysis consistent with the principles discussed above in finding the relevant collective bargaining agreements ambiguous, without resort to any artificial rules of construction. It then relied on

extrinsic evidence to hold that the agreements vested benefits. This decision should be affirmed.

Dated: April 12, 2018

Respectfully submitted,

s/ Maneesh Sharma
Maneesh Sharma
Assistant General Counsel, USW
60 Blvd of the Allies, Room 807
Pittsburgh, PA 15222
msharma@usw.org
412-562-2531

Counsel for United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union AFL-CIO, CLC, Amicus Curiae

s/ Carlos F. Bermudez
Carlos F. Bermudez
Associate General Counsel, UAW
8000 E. Jefferson Ave.
Detroit, MI 48207
cbermudez@uaw.net
313-926-5216

Counsel for International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Amicus Curiae

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations contained in Federal Rule of Appellate Procedure 29(a)(5) because, excluding the portions exempted by Rule 32(f), the brief contains 2,694 words.

Dated: April 12, 2018

s/ Maneesh Sharma

Maneesh Sharma
Assistant General Counsel, USW
60 Blvd of the Allies, Room 807
Pittsburgh, PA 15222
msharma@usw.org
412-562-2531

Counsel for United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union AFL-CIO, CLC, Amicus Curiae

CERTIFICATE OF SERVICE

I certify that on April 12, 2018, I electronically filed the foregoing brief with the United States Court of Appeals for the Sixth Circuit using the ECF system. All parties have consented to receive electronic service and will be served by the ECF system.

Dated: April 12, 2018

s/ Maneesh Sharma

Maneesh Sharma
Assistant General Counsel, USW
60 Blvd of the Allies, Room 807
Pittsburgh, PA 15222
msharma@usw.org
412-562-2531

Counsel for United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union AFL-CIO, CLC, Amicus Curiae