Case Nos. 08-55671, 08-55708
Decided: August 17, 2010
Panel: Reinhardt, Pregerson, Wardlaw, Circuit Judges

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF CALIFORNIA, ex rel. EDMUND G. BROWN, JR.,

Appellant/Cross-Appellee,

v.

SAFEWAY INC., ALBERTSON'S, INC., RALPHS GROCERY COMPANY, FOOD 4 LESS FOOD COMPANY, VONS COMPANIES, INC.,

Appellees/Cross-Appellants.

On Appeal from the United States District Court for the Central District of California, No. 2:04-cv-00687-AG-SS

BRIEF OF *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND COUNCIL ON LABOR LAW EQUALITY IN SUPPORT OF APPELLEES' PETITION FOR REHEARING AND REHEARING EN BANC

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America has no parent corporation and no publicly held company owns 10% or more of its stock.

The Council on Labor Law Equality has no parent corporation and no publicly held company owns 10% or more of its stock.

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IDENTITY OF *AMICI CURIAE* AND AUTHORITY TO FILE

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation, representing approximately 300,000 direct members with an underlying membership of over three million businesses and organizations of every size and in every industry sector and geographical region of the country. An important function of the Chamber is to represent the interests of its members as *amicus curiae* in cases involving issues of widespread concern to the American business community. The Chamber has participated as *amicus curiae* in numerous cases before this Court, including the panel's decision issued on August 17, 2010. *See, e.g.*, *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010); *E.E.O.C. v. Fed. Express Corp.*, 543 F.3d 531 (9th Cir. 2008).

The Council on Labor Law Equality ("COLLE") is a national association of employers that was formed to comment on, and assist in, the interpretation of the law under the National Labor Relations Act ("NLRA"). COLLE's single purpose is to follow the activities of the National Labor Relations Board ("NLRB") and the courts as they relate to the NLRA. Through the filing of *amicus* briefs and other forms of participation, COLLE provides a specialized and continuing business community effort to maintain a balanced approach – in the formulation and interpretation of national labor policy – to issues that affect a broad cross-section

of industry. COLLE has participated as *amicus curiae* in many cases before the United States Courts of Appeal, including the panel's decision issued on August 17, 2010. *See, e.g.*, *Bath Marine Draftsmen's Ass'n v. NLRB*, 475 F.3d 14 (1st Cir. 2007); *Pall Corp. v. NLRB*, 275 F.3d 116 (D.C. Cir. 2002).

The Appellant/Cross-Appellee State of California does not oppose the filing of this *amici curiae* brief, and the Appellees/Cross-Appellants consent to the filing of this *amici curiae* brief.

STATEMENT OF THE CASE AND INTEREST OF *AMICI CURIAE*

This case is important to the *amici* because the panel's decision is contrary to the policy of the NLRA – promoting industrial peace through collective bargaining. The panel incorrectly concluded that the mutual strike assistance agreement at issue in this case "lies outside the basic concerns of labor law." Slip op. 11973. To the contrary, such agreements are entered into by groups of employers to counteract the effects of a union's whipsaw strike, which is "the process of striking one at a time the employer members of a multi-employer association" with the "'calculated purpose' of causing 'successive and individual employer capitulations.'" *NLRB v. Truck Drivers Local Union No. 449 ("Buffalo Linen")*, 353 U.S. 87, 90 n.7 & 91 (1957) (quoting NLRB decision). Mutual aid pacts foster the policy of industrial peace by serving as an effective deterrent to the whipsaw strike.

To be sure, federal labor law affords both parties the right to engage in economic warfare (*i.e.*, strikes and lockouts) in order to exert leverage in collective bargaining. But the policy of the NLRA is served when these economic weapons incent the parties to resolve the labor dispute at the bargaining table.

By declaring the mutual strike assistance agreement in this case to be outside the scope of federal labor law and prohibited by antitrust law, the panel has eliminated an effective mechanism for maintaining the integrity of a multi-employer group. A lockout pact, by itself, is often not a practical or effective weapon to counteract a union's threat of a whipsaw strike. A collateral cost sharing arrangement is usually necessary for the multi-employer lockout to be a credible threat. Otherwise, the lockout will only be as strong as the weakest employer. The weakest employer in the group – the employer who is likely to be targeted by the union in a whipsaw strike – is likely to abandon the lockout if that employer believes it will suffer a disproportionate financial impact as a result of the lockout.

The panel's decision concludes that the revenue sharing arrangement in this case had an unlawful anticompetitive purpose, notwithstanding its clear connection to a labor dispute regulated by the NLRA. Employers do not enter into these types of arrangements to serve any anticompetitive purpose. They enter into a mutual

aid pact in order to defend against the potentially ruinous impact of a "divide and conquer" whipsaw strike strategy initiated by the union.

The panel's decision, if allowed to stand, will upset the delicate balance of power in many industries where multi-employer collective bargaining is the norm. Industrial warfare will be more likely in these industries because it will deprive the employers of an effective weapon to counterbalance the whipsaw strike. This result is directly contrary to federal labor policy, and therefore the *amici* urge the Court to grant the Appellees' petition for rehearing and rehearing en banc.

ARGUMENT

I. Multi-Employer Mutual Aid Pacts Are Fully Consistent with the National Labor Policy.

A. The Panel Based Its Decision on a Misinterpretation of Federal Labor Policy.

The panel's decision is based on a misinterpretation of the basic policy objective of the NLRA. The policy objective is not, as the panel opined, "to ensure that *employees* have sufficient strength to negotiate with their employers." Slip op. 11976 (emphasis in original).[1] The right of employees to organize and engage in

[1] The panel cites the Norris-LaGuardia Act, 29 U.S.C. § 102, and case law arising under that Act in support of this proposition. The Norris-LaGuardia Act is a separate labor statute that predates the NLRA. It was enacted for the limited purpose of prohibiting the use of injunctions to defeat strikes and other concerted activity. It did not seek to achieve the policy goal of the NLRA – establishing a federally regulated system of collective bargaining in order to foster industrial peace.

collective bargaining was not a policy end unto itself. Congress established a federally regulated system of collective bargaining in order to prevent industrial unrest and disruptions to commerce resulting from labor disputes:

> It is hereby declared to the policy of the United States *to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred* by encouraging the practice and procedure of collective bargaining….

29 U.S.C. § 151 (emphasis added).

Thus, the NLRA does not protect employees' right to engage in collective bargaining simply in order to give them greater leverage in negotiations with their employer, as the panel concluded. Collective bargaining is a means to the ultimate end of fostering industrial peace.

The panel also condemned the employers' mutual aid pact in this case because it would "reduce the economic impact of a strike, a lawful tool in collective bargaining, and ultimately … limit the wages and benefits of their employees." Slip op. 11974. This too is a misconception of the system of collective bargaining envisioned in the NLRA. Allowing *both* parties to exert economic pressure as a catalyst for producing an agreement on terms that are mutually acceptable (although perhaps not ideal for either side) is essential to the purpose of the NLRA.

Collective bargaining under the NLRA is premised on a mutual threat of economic warfare. "The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized." *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 489 (1960). Only if *both parties* have effective economic weapons "in reserve" is there a mutual incentive for the parties to resolve their negotiations peacefully. *See id.* (economic force is "a prime motive power for agreements in free collective bargaining"). The purpose of the NLRA would not be served if, as the panel believed, employees were unchecked in their ability to inflict economic pain on their employer in order to extract the highest possible wages and benefits on penalty of continued economic destruction.

In short, the national labor policy can be achieved only if employers are permitted to deploy an effective economic weapon to counterbalance the impact of a strike. The presence of these economic weapons will produce more stable collective bargaining agreements that both sides can accept as a fair reflection of their respective bargaining strengths. By depriving employers of an important economic weapon, the panel's decision dangerously upsets the balance of power envisioned by Congress – a balance that is all the more delicate in the context of multi-employer bargaining.

B. Multi-Employer Bargaining Is an Important and Longstanding Feature of the National Labor Policy.

In many industries, multi-employer bargaining is vital to effectuating "the national labor policy of promoting labor peace through strengthened collective bargaining." *Buffalo Linen*, 353 U.S. at 95. Multi-employer bargaining existed before the passage of the Wagner Act in 1935. *Id.* at 94. Formal multi-employer bargaining, or more informal coordinated bargaining by employers, continues to be prevalent in industries such as construction, coal, automobile, trucking, maritime, retail food, hotel, and professional sports. *See Brown v. Pro Football, Inc.*, 518 U.S. 231, 240 (1996) (noting that "multiemployer bargaining accounts for more than 40% of major collective bargaining agreements").

Multi-employer bargaining serves the goal of promoting industrial peace even though it aggregates the potential impact of a strike across an entire industry or region. In industries that are dominated by a single, powerful union, employers have resorted to multi-employer bargaining in order to create the balance of power necessary to produce peaceful, negotiated settlements rather than one-sided industrial warfare. *See Buffalo Linen*, 353 U.S. at 96 (discussing employers' interest in preserving multi-employer bargaining "as a means of bargaining on an equal basis with a large union").

II. Mutual Aid Pacts Are Lawful Economic Weapons That Are Commonly Used in Multi-Employer Bargaining.

A. Mutual Aid Pacts Are Necessary to Promote Effective Multi-Employer Bargaining and Deter Economic Warfare.

The panel's decision suffered from the fundamental misconception that mutual aid pacts, such as the mutual strike assistance agreement in this case, are improper because they are used to "defeat their employees' collective bargaining representatives who are engaged in perfectly lawful conduct." Slip op. 11974. There is nothing improper about an employer effort to deter or defeat a lawful union strike. "[A]n employer may legitimately blunt the effectiveness of an anticipated strike by stockpiling inventories, readjusting contract schedules, or transferring work from one plant to another, even if he thereby makes himself 'virtually strikeproof.'" *NLRB v. Brown*, 380 U.S. 278, 283 (1965). Such countermeasures further the basic purpose of the NLRA – avoiding interruptions to commerce by encouraging the parties to resolve their labor disputes through peaceful negotiations.

The panel also erroneously concluded that mutual aid pacts "unbalance the existing, carefully drawn [bargaining] process." Slip op. 11970. In reality, mutual aid pacts are needed to counteract the powerful and destabilizing force of a union whipsaw strike strategy. A whipsaw strike strategy "threatens the destruction of the employers' interest in bargaining on a group basis." *Buffalo Linen*, 353 U.S. at

93. Therefore, the Supreme Court in *Buffalo Linen* endorsed the multi-employer lockout as a means "to preserve the multiemployer bargaining … from the disintegration threatened by the Union's strike action." *Id.* at 97.

B. Revenue Sharing Is a Valid and Important Method of Combating Union Whipsaw Strike Tactics.

Although the panel recognized that a multi-employer lockout pact is a legitimate countermeasure, the panel condemned the revenue sharing aspect of the mutual aid pact in this case because of its allegedly anticompetitive effects. *See* Slip op. 11975. However, federal labor law permits employers to use economic weapons that have anti-competitive effects. *See Pro Football*, 518 U.S. at 237 ("it would be difficult, if not impossible, to require groups of employers and employees to bargain together, but at the same time to forbid them to make among themselves or with each other any of the competition-restricting agreements potentially necessary to make the process work or its results mutually acceptable").

Revenue sharing agreements, entered into in the context of a lockout agreement, serve the same legitimate objective as other economic weapons that the Supreme Court has explicitly endorsed – the objective of eliminating competitive disadvantages that are caused by the strike or lockout. In *NLRB v. Brown*, the Supreme Court upheld a multi-employer group's decision to not only lockout in response to a whipsaw strike, but to continue operating during the lockout with temporary replacement workers. The Court held that this countermeasure, used in

the retail food industry, was a legitimate effort to avoid the competitive disadvantage that the locking out employers might suffer if only the struck employer were permitted to continue to operate during the lockout:

> If…the struck employer does choose to operate with replacements and the other employers cannot replace after lockout, the economic advantage passes to the struck member, the nonstruck members are deterred in exercising the defensive lockout, and the whipsaw strike … enjoys an almost inescapable prospect of success.

NLRB v. Brown, 380 U.S. at 285 (quoting decision of the Court of Appeals).[2]

Thus, the Supreme Court in *NLRB v. Brown* explicitly endorsed a multi-employer group's use of an economic weapon designed to neutralize any competitive advantage that might be gained during the course of a strike or lockout. The Court did so because the whipsaw strike manipulates the employers' competitive interests in order to undermine the group nature of multi-employer bargaining. As the Court recognized, "[t]he retail food industry is very competitive and repetitive patronage is highly important." *Id.* at 284. Consumers can easily change their shopping pattern and shop at another store in response to a selective strike or picketing. Therefore, if one of the employers were able to gain

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[2] An employer who suffers disproportionate losses as a result of a whipsaw strike is not permitted to withdraw from the multi-employer bargaining, absent "unusual circumstances." *Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 454 U.S. 404 (1982). *Bonanno* makes clear that the disproportionate impact of a strike on one employer is not an "unusual circumstance" that would justify withdrawal.

a competitive advantage by virtue of the whipsaw strike and lockout, the other employers "might bolt the group and come to terms with the Local [Union], thus destroying the common front essential to multiemployer bargaining." *Id.*

Revenue sharing agreements are an important method of achieving the same objective as the use of temporary replacement workers in *NLRB v. Brown* – correcting for the distortion of consumer behavior caused by a whipsaw strike, particularly in industries that are driven by short-term consumer behavior. Indeed, the panel's decision recognizes that a "strike insurance" arrangement, whereby employers would receive payments to cover the costs of a strike, *is* a lawful method for employers to combat the disproportionate economic impact of a whipsaw strike in multi-employer bargaining. Slip op. 11975 (citing *W.P. Kennedy v. Long Island R.R. Co.*, 319 F.2d 366 (2d Cir. 1963)). However, the panel distinguished the strike insurance arrangement in *Kennedy* on the grounds that the employers in that case paid a fixed premium (as opposed to an amount that varied with the employer's revenues) and received payments that covered only fixed costs (as opposed to any change in profits resulting from the strike). Slip op. 11975 n.14.

The panel reads the case law too narrowly, however. For instance, the panel ignores the D.C. Circuit's decision in *Air Line Pilots Ass'n Int'l v. Civil Aeronautics Board*, 502 F.2d 453 (D.C. Cir. 1974), which upheld the revenue

sharing provisions of a mutual aid pact in the airline industry. The provisions of that pact called for payments in amounts that varied with each airline's revenue and accounted for changes in the airlines' profits as a result of the strike. Specifically, the pact provided that the struck airline would receive "windfall payments" in an amount equal to the other airlines' increase in revenue as a result of the strike, minus their additional operating expenses. *Id.* at 455. The pact also provided for "supplemental payments" equal to a percentage of the struck airline's normal operating expenses. These supplemental payments were paid by the other airlines in proportion to their total operating revenues as compared to the rest of the group. *Id.* The supplemental payments also accounted for "post-strike losses" attributable to the cost of resuming operations and the "long-term loss of traffic attributable to the loss of carrier identity in the market." *Id.* at 459.[3] The D.C. Circuit held that these revenue sharing provisions were lawful even though they were designed to redistribute profits resulting from changes in consumer behavior during the strike:

> [T]he Board reasonably believed that in assessing the dynamics of the companies' position during strikes, operating profits should be compared to 'normal profits'

[3] These "post-strike losses" are equivalent to the two-week tail provision in the mutual strike assistance agreement in this case. *See* Slip op. 11934 (stating that the revenue sharing agreement "was to continue for two full weeks after the termination of any strike or lockout").

> for a similar period – profits which the company would have enjoyed if it had not sustained a strike.

Id. at 459.

These decisions demonstrate that the panel was simply wrong in concluding that revenue sharing arrangements have "*never* played a role in the collective bargaining process." Slip op. 11973 (emphasis added).[4] Mutual aid pacts, including pacts with revenue sharing provisions, have been a feature of multi-employer bargaining for decades. To be sure, there are few reported cases concerning such pacts, but that is a testament to their purpose and value in the bargaining process. As discussed previously, the purpose of a mutual aid pact is to *deter* economic warfare in collective bargaining. The value of a mutual aid pact is realized when the pact is *not* exercised because its mere existence serves to dissuade the union from engaging in a whipsaw strike and, instead, pursue a negotiated resolution of the dispute.

C. Revenue Sharing Agreements, Entered Into In the Context of a Mutual Aid Pact, Are Protected by the Nonstatutory Exemption.

The revenue or cost sharing provisions of a mutual aid pact are protected by the nonstatutory labor exemption from the antitrust laws. The fact that the

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[4] Even if a mutual aid pact with a revenue sharing provision were a novel weapon, which it is not, that is not a valid reason to reject it. *Insurance Agents*, 361 U.S. at 496 (dismissing "the relevance of whether the practice in question is time-honored or whether its exercise is generally supported by public opinion").

agreement redistributes revenue does not, by itself, remove it from the scope of the nonstatutory exemption, nor does it render the pact "per se" unlawful under the antitrust laws. *See* Slip op. 11941 (applying a "per se-plus" or "quick look-minus" antitrust analysis).

The Second Circuit in *Kennedy* specifically rejected the argument that a strike insurance arrangement constitutes a "per se" violation of the antitrust laws. The Second Circuit so held not because of the peculiarities of the strike insurance arrangement in that case (*e.g.*, the payment of fixed premiums to cover fixed costs), but for the "fundamental reason that the [antitrust] statutes were designed principally to outlaw restraints upon commercial competition in the marketing and pricing of goods and services and were not intended as instruments for the regulation of labor-management relations." *Kennedy*, 319 F.2d at 372-73.

The nexus between the revenue sharing provisions of a mutual aid pact and the underlying labor dispute is obvious. The revenue sharing provisions are a defensive measure, predicated explicitly on economic warfare initiated by the union in the context of a labor dispute. *See* Slip op. 11933 (describing the pact in this case); *Kennedy*, 319 F.2d at 374 n.4 ("It cannot be overlooked that the payment of proceeds under the strike insurance plan is a *purely defensive measure and is triggered only by a narrowly circumscribed class of strike activity*…." (emphasis added)).

Employers do not enter into mutual aid pacts in order to achieve any anticompetitive outcome.[5] Employers stand to gain nothing by implementing a mutual aid pact; they can only hope to mitigate their losses. The purpose of a mutual aid pact is to *deter* economic warfare and, therefore, employers enter into the pact in the hope that it will *not* be implemented.

Because the revenue sharing provisions of a mutual aid pact are to be invoked only in the context of a labor dispute, they are protected by the nonstatutory exemption. The nonstatutory exemption "limits[s] an antitrust court's authority to determine, in the area of industrial conflict, what is or is not a 'reasonable' practice." *Pro Football*, 518 U.S. at 237. By holding the agreement in this case to be in violation of the antitrust laws, the panel intruded into an area that is regulated by the federal labor laws.

III. Federal Labor Law Regulates the Use of Mutual Aid Pacts.

The panel's misunderstanding of the purpose and value of mutual aid pacts led to the false conclusion that such pacts, when they include revenue or cost sharing provisions, "lie[] completely outside the matters regulated by labor law…." Slip op. 11971. A revenue sharing agreement is an economic weapon that is "part

[5] Of course, because the panel in this case applied a "per se-plus" or "quick look-minus" analysis, there was no consideration of the evidence of the employers' actual intent or the effect of the pact on competition. Judge Wardlaw dissented on this basis. Slip op. 11982 ("I do not agree that whether the MSAA violates the Sherman Act is intuitively obvious; a more extended examination of the evidence is warranted.").

and parcel of the process of collective bargaining." *Insurance Agents*, 361 U.S. at 495. "The labor laws give the [NLRB], not antitrust courts, primary responsibility for policing the collective bargaining process." *Pro Football*, 518 U.S. at 242.

The NLRB, with Supreme Court approval, has sanctioned the multi-employer lockout pact as a lawful economic weapon. *See Buffalo Linen*, 353 U.S. at 97 (holding that the NLRB "correctly balanced the conflicting interests in deciding that a temporary lockout to preserve the multiemployer bargaining basis from the disintegration threatened by the Union's strike action was lawful").

The revenue sharing provisions of a mutual aid pact are inextricably linked to the lockout pact. They are designed to ameliorate the impact of the lockout on the employers, which is an entirely legitimate objective under federal labor law. *See Insurance Agents*, 361 U.S. at 496 ("Surely it cannot be said that the only economic weapons consistent with good-faith bargaining are those which … maximize the disadvantage to the party using them.").

The revenue sharing provisions reinforce the basic lockout pact by ensuring that the existing competitive balance is not distorted by the whipsaw strike and responsive lockout.[6] In some cases, the lockout pact might not exist at all without

[6] As this case demonstrates, even when all of the employers in the industry implement the lockout, some employers may nonetheless suffer a disproportionate impact as a result of union picketing designed to influence customer behavior. *See* Slip op. at 11935 (describing the union's selective picketing of certain employers).

a cost or revenue sharing provision to ensure that no employer will suffer a competitive disadvantage by implementing the lockout. Correcting for market disruptions *caused by the labor dispute* is a legitimate reason to engage in revenue sharing. *See Air Line Pilots Ass'n*, 502 F.2d at 459 (upholding mutual aid pact which sought to account for the "normal profits" that a company "would have enjoyed if it had not sustained a strike"); *see also NLRB v. Brown*, 380 U.S. at 285 (holding that use of temporary replacement workers during a multi-employer lockout was a lawful method of preventing the struck employer from gaining an "economic advantage" as a result of the strike).

The panel believed that the right to lockout, by itself, is sufficient to preserve the integrity of the multi-employer bargaining process in the face of a whipsaw strike. Slip op. 11975. However, the Court may not deny employers an economic weapon in a labor dispute simply because the Court believes that other weapons are sufficient. "[N]either States nor the Board is 'afforded flexibility in picking and choosing which economic devices of labor and management shall be branded unlawful.'" *Lodge 76, IAM v. Wisconsin Emp't Relations Comm'n*, 427 U.S. 132, 149 (1976).

Thus, by outlawing the revenue sharing provisions of the mutual aid pact in this case, the panel has intruded into an area regulated by federal labor law and has

undercut the ability of a multi-employer group to implement an economic weapon, the lockout, that has been deemed lawful by the NLRB and the Supreme Court.

CONCLUSION

For all of the foregoing reasons, *amici curiae* Chamber of Commerce of the United States of America and Council on Labor Law Equality urge the Court to grant the Appellees' petition for rehearing and rehearing en banc.

Dated: October 12, 2010

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CERTIFICATE OF COMPLIANCE
PURSUANT TO FED. R. APP. P. 29

I certify that pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 29-2(c)(2), the attached Brief of *Amici Curiae* Chamber of Commerce of the United States of America and Council on Labor Law Equality in Support of Appellees' Petition for Rehearing and Rehearing En Banc contains

√ No more than 4200 words.

October 12, 2010

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