Nos. 10-1821, -1866

In the United States Court of Appeals for the Seventh Circuit

CLIFTON SANDIFER, NICOLE ANDREWS, DORA ANDERSON, HERBERT HARRIS, BERNARD JENKINS, ALVIN MITCHELL, MARILYN WALTON, and KENNY WILLIAMS,

Plaintiffs-Appellees/Cross-Appellants,

v.

UNITED STATES STEEL CORPORATION,

Defendant-Appellant/Cross-Appellee.

Appeal Under 28 U.S.C. §1292(B) From An Order Of The United States District Court For The Northern District Of Indiana, Hammond Division Case No. 2:07-cv-00443-RLM-PRC The Honorable Robert L. Miller

MOTION OF THE NATIONAL ASSOCIATION OF MANUFACTURERS, AMERICAN MEAT INSTITUTE AND THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF REVERSAL AS SOUGHT BY DEFENDANT-APPELLANT/CROSS-APPELLEE UNITED STATES STEEL CORPORATION

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The National Association of Manufacturers ("NAM"), the American Meat Institute ("AMI"), and the Society for Human Resource Management ("SHRM") (collectively, the "*Amici*") respectfully move pursuant to Federal Rule of Appellate Procedure 29 for leave to file a brief as *amici curiae* in support of the Opening Brief of Defendant-Appellant/Cross-Appellee United States Steel Corporation ("US Steel"). In support of their motion, *Amici* state as follows:

1. NAM is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to United States economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards. More than 11 million Americans are employed in the manufacturing sector, and more than 1.6 million are union members. NAM regularly participates in cases involving or affecting the interpretation of collective bargaining agreements. *See, e.g., AT&T Techs. v. Communs. Workers of Am.*, 475 U.S. 643 (1986); *Connolly v. Pension Ben. Guaranty Corp.*, 475 U.S. 211 (1986); *Buffalo Forge Co. v. United Steelworkers of Am.*, 428 U.S. 397 (1976); *New York v. Nat'l Servs. Indus.*, 352 F.3d 682 (2d Cir. 2003); *Electromation v. NLRB*, 35 F.3d 1148 (7th Cir. 1994).

2. AMI is the oldest and largest national trade association representing packers and processors of beef, pork, lamb, veal, turkey and processed beef products. AMI's member companies produce more than 95 percent of the meat products available in the United States. There are more than 526,000 workers employed in the meat and poultry packing and

processing industries in the United States, and AMI members contribute more than $156 billion to the U.S. Gross Domestic Product.

3. SHRM is the world's largest association devoted to human resource management. Representing more than 250,000 members in over 140 countries, SHRM serves the needs of human resource professionals and advances the interests of the human resource profession. SHRM has more than 575 affiliated chapters within the United States and subsidiary offices in China and India. SHRM members possess expertise in administering employee wage and benefit programs, assisting in the negotiation of collective bargaining agreements and bargaining with unions over all manner of wage and hour issues, and in designing and evaluating compensation policies to achieve high employee productivity and retention.

4. *Amici* fully support the position of Defendant-Appellant/Cross-Appellee US Steel that "principal activities," as used in 29 U.S.C. §254(a), do not include donning, doffing and washing activities that are excluded from the workday pursuant to 29 U.S.C. §203(o). *Amici* write separately to emphasize the importance that Congress has placed on protecting the collective bargaining process in enacting labor legislation, based on its finding that this process best protects the interests of both employees and employers. Although US Steel addresses the text and history of Section 203(o) in its brief, *Amici* believe that the text and history of the National Labor Relations Act, 29 U.S.C. §151 *et seq*., the Labor Management Relations Act, 29 U.S.C. §§141-97, as well as a broader history of the Fair Labor Standards Act, 29 U.S.C. §201 *et seq*., as amended by the Portal-to-Portal Act, 29 U.S.C. § 251 *et seq*., are critical to proper resolution of the argument presented in the Opening Brief and reinforce Congress' long-standing and oft-stated desire to promote

and protect the rights of employers and employees to collectively bargain as to appropriate working hours and pay rates.

5. *Amici* further write separately to address the wide-ranging effects that would result were this Court to accept Plaintiffs-Appellees/Cross-Appellants' argument that activities specifically excluded from the workday by agreement between employers and employees could nevertheless trigger the beginning of the "continuous workday" rule such that compensation must be paid for travel time that occurs after the donning, doffing and washing activities at the beginning of the day. Based on the enactment of Section 203(o), unions and management throughout the country – including many of whom are employed by NAM and AMI members – have developed customs and practices or have otherwise expressly agreed to the beginning and end of the paid work day. Relying on Section 203(o), employers and unions have reached collective agreements relating to the activities for which compensation is owed and when the employee's time clock begins to run. Acceptance of the Appellees/Cross-Appellants' argument will dramatically upset the careful balance set by the employers and employees, and inject uncertainty into all facets of the collective bargaining process.

6. *Amici* have no direct interest, financial or otherwise, in the outcome of this litigation. However, because many of their members are parties to collective bargaining agreements, *Amici* respectfully seek to file an *amicus curiae* brief to offer the Court their broader perspective on the legislation governing collective bargaining and the role of collective bargaining in setting expectations as to the hours of the work day and the practical implications of the argument presented by Appellees/Cross-Appellants.

7. Counsel for *Amici* attempted to contact counsel for the parties to ascertain whether they consented to the motion for leave to file. Counsel for Defendant-Appellant/Cross-Appellee consented to the motion. Counsel for *Amici* repeatedly attempted to contact counsel for Plaintiffs-Appellees/Cross-Appellants but received no response.

WHEREFORE, the National Association of Manufacturers, the American Meat Institute, and the Society for Human Resource Management respectfully request that the Court grant their motion for leave to file a brief in support of Defendant-Appellant/Cross-Appellee United States Steel Corp.

August 29, 2011

Respectfully submitted,

/s/ David B. Goroff

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CERTIFICATE OF SERVICE

I hereby certify that on August 29, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 10-1821 -1866

Short Caption: Sandifer, et al. v. U.S. Steel

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.

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SOCIETY FOR HUMAN RESOURCE MANAGEMENT

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

DAVID B. GOROFF, FOLEY & LARDNER LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: s/ DAVID B. GOROFF Date: August 29, 2011

Attorney's Printed Name: DAVID B. GOROFF

Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d). Yes X No

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(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

NATIONAL ASSOCIATION OF MANUFACTURERS

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

DAVID B. GOROFF, FOLEY & LARDNER LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

None

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

None

Attorney's Signature: s/ DAVID B. GOROFF Date: August 29, 2011

Attorney's Printed Name: DAVID B. GOROFF

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AMERICAN MEAT INSTITUTE

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DAVID B. GOROFF, FOLEY & LARDNER LLP

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STATEMENT OF INTEREST OF *AMICI CURIAE*

The National Association of Manufacturers

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to United States economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards. The manufacturing sector is responsible for more than $4.5 trillion in sales each year.

More than 11 million Americans are employed in the manufacturing sector, and more than 1.6 million are union members. The NAM has many members with collective bargaining agreements ("CBAs"), and has participated as *amicus curiae* in a variety of cases involving issues that arise in the context of collective bargaining negotiations.

American Meat Institute

The American Meat Institute ("AMI") is the oldest and largest national trade association representing packers and processors of beef, pork, lamb, veal, turkey and processed beef products. AMI's member companies produce more than 95 percent of the meat products available in the United States.

There are more than 526,000 workers employed in the meat and poultry packing and processing industries in the United States. AMI members contribute more than $156 billion to the U.S. Gross Domestic Product. Of the 500,000 plus workers employed in the meat and poultry processing industry, approximately 60% are currently members of unions, which represent their interests through collective bargaining.

The Society for Human Resource Management

The Society for Human Resource Management ("SHRM") is the world's largest association devoted to human resource management. Representing more than 250,000 members in over 140 countries, SHRM serves the needs of human resource professionals and advances the interests of the human resource profession. SHRM has more than 575 affiliated chapters within the United States and subsidiary offices in China and India. SHRM members possess expertise in administering employee wage and benefit programs, assisting in the negotiation of collective bargaining agreements and the bargaining with unions over all manner of wage and hour issues, and in designing and evaluating compensation policies to achieve high employee productivity and retention.

The *Amici* fully support the position of Defendant-Appellant/Cross-Appellee United States Steel Corporation ("US Steel") that, under the Fair Labor Standards Act ("FLSA"), where an employer and union have agreed that the activities of donning, doffing and washing ("Clothes-Changing Activities") are to be excluded from the workday pursuant to 29 U.S.C. §203(o) ("Section 203(o)"), these same activities may not be "principal activities" that start or end the "continuous workday" under 29 U.S.C. §254(a), such that

compensation must be paid for travel time that occurs after the Clothes-Changing Activities at the start of the day and before the Clothes-Changing Activities at the end of the day.

Amici write separately to emphasize the primary importance that Congress has placed on protecting the collective bargaining process in enacting its major pieces of labor legislation, based on its finding that this process best protects the interests of both employees and employers, and how the District Court's position threatens that process.

Below, the District Court held open the possibility that even where a union and employer have agreed in a CBA that Clothes-Changing Activities will not be part of the start or end of an employee's workday (a union concession that is nearly always made in exchange for benefits in terms of higher hourly pay or other tangible perquisites), a court or a regulator, such as the United States Department of Labor ("DOL"), could nevertheless override this "carefully threshed out" choice and treat such Clothes-Changing Activities as the start of the workday, thereby requiring an employer to compensate employees for the time spent in travel from the Clothes-Changing Activities to the place where they are being employed to perform their principal activities ("Travel Time").

In essence, that position would nullify the carefully-reasoned negotiation between the employer and its union. It would not only interfere with CBAs, but with the specific flexibility Congress intended be accorded to employees and employers under both Section 203(o) and Section 254(a) of the Portal-to-Portal Act ("PPA"), 29 U.S.C. §251 *et seq*., at §254(a) ("Section 254"). This is a dangerous path for courts and regulators to pursue and, as the broad diversity of *Amici's* members illustrates, would have negative repercussions in all sectors of America's economy.

As required by Fed. R. App. P. 29, *Amici* represent that no party's counsel authored this brief in whole or in part or contributed money that was intended to fund preparing or submitting this brief. No person, other than *Amici* or their members contributed money that was intended to fund preparing or submitting the brief.

SUMMARY OF ARGUMENT

In enacting each of the transformative labor laws of the Twentieth Century, including the National Labor Relations Act ("NLRA"), the Labor Management Relations Act ("LMRA"), the FLSA and the PPA, Congress repeatedly emphasized the need for courts and governmental entities to defer to the "sanctity" of the collective bargaining process. In the text of each of these laws, Congress reaffirmed its intent to enhance and protect the use of collective bargaining by unions and employers to solve problems. Thus, Congress, for example, provided for exclusive federal jurisdiction over matters involving the violation of agreements between employees and employers in 29 U.S.C. §185; provided in FLSA Section 203(o) that unions and employers, through collective bargaining, may exclude Clothes-Changing Activities from the workday; and, in Section 254, allowed unions and employers to agree that Travel Time – time spent walking, riding, or traveling to or from a principal activity in a workplace – may be compensable even though, in the absence of such agreement, the PPA specifically excludes such activities from compensable time.

The legislative history behind these laws shows Congress believed that collective bargaining best protects the interests of both employees and employers. Congress additionally found that collective bargaining protects the freedom of employees and

employers alike by giving them flexibility in how to resolve the challenges of their specific industry as they deem best. Congress specifically directed that regulators should not be allowed to displace the choices unions and employers make in CBAs. Indeed, the PPA was motivated by litigation that was generated when courts, through judicial interpretation of the FLSA, overrode CBA provisions. Congress, in turn, then passed Section 203(o) when employers continued to face unbargained-for liability in litigation that flowed through a loophole left open in the PPA about how Clothes-Changing Activities were to be treated. Representative Christian Herter, Section 203(o)'s sponsor, was specifically concerned that there be no interference with CBA determinations of what constituted part of a working day. Section 203(o)'s text states unequivocally that Clothes-Changing Activities "at the beginning or end of each workday" are to be excluded from "hours worked" where a "bona fide collective bargaining agreement" so provides. 29 U.S.C. §203(o).

Accepting Congress' directive on this issue, courts, including this Court, have frequently reaffirmed the need to defer to choices made through the collective bargaining process in general and to defer to CBA choices as to the treatment of Travel Time in particular. Until last year, the DOL had long advocated that where a CBA excluded Clothes-Changing Activities from the start of a workday, Travel Time would, as a result, also be non-compensable.

Now, the District Court's interpretation of Section 203(o) and Section 254 threatens to upset the "carefully thresh[ed] out" balance unions and employers have reached over the years by allowing for the possibility that Clothes-Changing Activities may be treated as starting the workday, even when the union and the employer have specifically agreed (or

established through practice and custom) that such Activities are *not* the "start" or indeed any part of the workday. The District Court acknowledges that, as here, an employer and its union may agree in a CBA to exclude Clothes-Changing Activities from the "hours of employment" and make such Activities non-compensable under the FLSA, but erroneously leaves open the possibility that these same Activities may still be "principal activities" triggering the continuous workday rule under the PPA and requiring payment for Travel Time at the start or end of the day.

This is exactly what Representative Herter inveighed against and turns the PPA's presumption that Travel Time will be noncompensable on its head. The PPA specifically states that Travel Time may not be considered compensatory *unless* a union and employer agree that it should be. 29 U.S.C. §254(b). Here, not only is there no affirmative agreement to treat such Travel Time as compensable, there is a specific agreement between the union and the employer by CBA to exclude Clothes-Changing Activities both from being compensable and from being treated as part of the workday. Yet the District Court somehow construes these two statutory-based exclusions to leave room for the compensation of Travel Time. Accepting this choplogic would open the loophole that Congress sought to close in passing Section 203(o), by creating a legion of new instances where employers can face unexpected liability and litigation that they sought to avoid through their CBAs.

The risks posed by the District Court's reasoning go well beyond the immediate circumstances of this case. If courts or regulators may override CBAs after years of being in force, unions and employers will be reluctant to trust the collective bargaining process in

the future, not knowing if the resolution they reach on any issue will be respected. Giving courts and regulators this authority also will deprive employees and employers of the latitude Congress intended for them to have to address the particular concerns facing their industry through negotiation. For instance, if an employer believes it will be stuck with the "*quid*" part of a *quid pro quo* bargain, while deprived of the "*quo*," it will be less likely to offer future concessions to workers. Since Congress has found that collective bargaining results in higher wages and more comfortable lives for employees, a threat to collective bargaining can only hamper these vital interests. Displacing collective bargaining will make it much more difficult to determine how many hours a given employee has worked and will reward those who are inefficient in their Travel Time at the expense of the efficient. This will inevitably result in a high volume of unnecessary litigation, exactly what Congress sought to avoid in enacting the PPA and Section 203(o).

In a time of economic crisis, this is an especially wrong path to follow. The focus should be on strengthening relationships between employers and their unions, rather than introducing topics for possible discord. It should be on facilitating the creation and maintenance of jobs and not on making it more expensive for employers to maintain their present workforce.

———————♦———————

ARGUMENT

I. Congress Has Repeatedly Emphasized The Sanctity Of Collective Bargaining And Has Specifically Directed That Courts And Regulators Should Respect Collective Bargaining Decisions As To Whether Clothes-Changing Activities Are Excluded From The Workday.

A. Congress' Intent To Enable, Enhance And Protect Collective Bargaining Is A Primary Theme In American Labor Law.

Through decades of labor legislation, including the NLRA, 29 U.S.C. §151 *et seq*., the LMRA, 29 U.S.C. §§141-97, the FLSA, 29 U.S.C. §201 *et seq*., and the PPA, 29 U.S.C. §251 *et seq*., Congress has extolled the sanctity of the collective bargaining process and made the promotion of collective bargaining a central legislative goal. Congress has found specifically that collective bargaining promotes employees' standard of living, treats both employees and employers fairly and best allows labor and management to address the widely disparate issues that different trades and industries in America face. Accordingly, Congress directed that CBA determinations should generally be free from judicial or regulatory interference.

1. The NLRA

In passing the NLRA decades ago, Congress made findings that collective bargaining "safeguards commerce from injury" and declared it to be national policy to "encourag[e] the practice and procedure of collective bargaining." 29 U.S.C. §151. Congress noted that the absence of collective bargaining (at that time due to some employers' refusal to engage in this process) burdened and obstructed commerce by "impairing the efficiency, safety or operation of the instrumentalities of commerce," "materially affecting, restraining the flow

of raw materials or manufactured or processed goods from or into the channels of commerce" or the prices thereof or "causing the diminution of employment and wages" in a volume that impaired commerce. *Id*.

Congress emphasized that collective bargaining was the best antidote to such ills:

> Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.
>
> * * *
>
> It is hereby declared to be 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 and by protecting the exercise of workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Id.

To encourage collective bargaining, Congress mandated that employees "shall" have the right to organize and collectively bargain. NLRA Section 7 provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . .

29 U.S.C. §157.

In interpreting the NLRA, the U.S. Supreme Court has acknowledged Congress' desire to allow matters of vital concern to labor and management to be resolved through collective bargaining. *E.g., Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 211 (1964) (agreeing with the NLRB that the issue of "contracting out" – where an employer contracts with an outside party to perform tasks previously done by a union – "is a mandatory subject of collective bargaining would promote the fundamental purpose of the [NLRA] by bringing a problem of vital concern to labor and management within the framework established by Congress as most conducive to industrial peace"). The Supreme Court reaffirmed in *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456 (2009), that a CBA's terms should be honored unless it violates a federal statute, stating:

> As in any contractual negotiation, a union may agree to the inclusion of an arbitration provision in a collective bargaining agreement in return for other concessions from the employer. *Courts generally may not interfere in this bargained-for exchange. . . . As a result, the CBA's arbitration provision must be honored unless the [specific labor law] itself removes this particular class of grievances from the NLRA's broad sweep. It does not*.

Id. at 1464-65 (citations omitted; emphasis added).

2. The LMRA

In 1947, Congress passed the Taft-Hartley Act, later codified as the LMRA. Congress therein amended the NLRA to restrict certain union activities and to guarantee freedom of speech and conduct for employers and individual employees. Significantly, not only did Congress leave intact the NLRA's commitment to collective bargaining, it provided a

statutory framework for conducting collective bargaining in Section 8(d), now codified at 29 U.S.C. §158. That Section provides:

> [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, . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession.

Id. Section 158 also sets forth procedures that a party to a CBA must follow before it may modify or terminate the contract. *Id*.

Likewise, to limit state and local government interference and ensure the deference to collectively-bargained choices by federal courts, LMRA Section 301, codified at 29 U.S.C. §185, provides for exclusive federal jurisdiction to adjudicate disputes as to CBAs. Section 301 states:

> Suits for violation of contracts between an employer and a labor organization representing employees in the industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties. . . .

29 U.S.C. §185(a).

As it has with the NLRA, the U.S. Supreme Court has emphasized that the LMRA embodies a policy of deferring to collective bargaining decisions:

> [O]ne policy of particular importance – if not the overriding one – was the policy of free, collective bargaining. And to make crystal clear the intention to leave the parties entirely free of any Government compulsion to agree to a proposal, or even reach an agreement, Congress added section 8(d) defining 'to bargain collectively' as 'not [to] compel either party to agree to a proposal or require the making of a concession.' 29 U.S.C. §158(d). *It follows that the parties' agreement*

> *primarily determines their relationship*. If the parties' agreement specifically resolves a particular issue, the courts cannot substitute a different resolution.

Carbon Fuel Co. v. United Mine Workers of Am., 444 U.S. 212, 219 (1979) (citations omitted; emphasis added).

3. The FLSA

In the FLSA, Congress again restated its commitment to collective bargaining. Congress passed the FLSA against the backdrop of the Depression, with the intent of protecting workers who were unable to organize. In calling for the legislation that would eventually become the FLSA, President Roosevelt emphasized his concern about the "exploitation of *unorganized* labor." H.R. DOC. NO. 75-255, at 2 (1937) (emphasis added). Congress enacted the FLSA to provide a minimum standard of living for workers by providing a floor for hourly wages, qualification for overtime, and age of employability (to avoid child labor). Once that foundation was achieved for unorganized workers, Congress intended to leave matters to collective bargaining for those who were represented by a union.

Thus, as Congress debated the legislation, President Roosevelt told both Houses that, once a floor of acceptable wages and hours was established, it was best to leave the negotiation for better terms to the collective bargaining process:

> We are seeking, of course, only legislation to end starvation wages and intolerable hours; *more desirable wages are and should continue to be the product of collective bargaining.*

H.R. DOC. NO. 75-458, at 4 (1938) (emphasis added).

That Congress believed collective bargaining would protect at least the Minimum Wage and Hour Standards sought by the law is evident from a debate between two future Supreme Court Justices, then-United States Attorney General Robert H. Jackson and then-Labor Committee Chairman Hugo L. Black, reproduced in the Joint Senate and House Report regarding this legislation. Attorney General Jackson affirmed that the FLSA "gives effect to collective bargaining, as I understand it. I do not think you are in any danger of collective bargaining reaching a wage below the minimum." *Bills to Provide for the Establishment of Fair Labor Standards In Employments In and Affecting Interstate Commerce and for Other Purposes: Joint Hearing on S. 2475 and H.R. 7200 Before the S. Comm. on Education and Labor and the H. Comm. on Labor*, 75th Cong. 22 (1937) (Statement of Robert H. Jackson).

Witnesses who testified before Congress at the hearing on FLSA echoed that the best way to ensure a minimally-good quality of life for all workers was through collective bargaining, but acknowledged that many workers lacked access to this opportunity:

> Some observers have mentioned that all this could and should be done by organized labor unions. . . . It might be a very fine thing if all of our 43,000,000 wage earners were members of well organized and intelligently led unions. No doubt at some very distant time this or something near it may exist. But it will take many years to organize into well-administered unions the great body of wage earners in the United States. We cannot delay for that many years.

Id. at 97 (Statement of Robert Johnson).

4. The PPA

In 1947, Congress amended the FLSA by passing the PPA, 29 U.S.C. §251 *et seq*. Congress' findings set forth in Section 251 of the PPA show that it was specifically targeted at judicial determinations that had trumped CBA provisions and resulted in immense and unexpected liabilities to employers. Congress found that the FLSA at the time had "been interpreted judicially in disregard of long-established customs, practices and contracts between employer and employee, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation upon employers." 29 U.S.C. §251(a). Congress further found that, unless this disregard of long-established customs was corrected, one of the resulting harms would be that "voluntary collective bargaining would be interfered with and industrial disputes between employees and employers would be created." *Id*.

Congress, therefore, declared it to be national policy to correct such existing "evils":

> (1) to relieve and protect interstate commerce from practices which burden and obstruct it;
>
> (2) *to protect the right of collective bargaining*; and
>
> (3) to define and limit the jurisdiction of the courts.

Id. at §251(b) (emphasis added).

To implement its findings in the PPA, Congress generally excluded, for purposes of calculating wages and overtime for claims arising after its enactment, the time referred to herein as "Travel Time." That is, time spent:

(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

(2) activities which are preliminary to or postliminary to said principal activity or activities which occur either prior to the time of any particular work day at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities,

Id. at §254(a).

However, in establishing this general exclusion, there, too, Congress specifically provided that private parties could contract around this exclusion and make such activities compensable. Thus, Section 254(b) states that an employer is not relieved from liability with respect to any of the above activities:

if such activity is compensable by either –

(1) An express provision of a written or non-written contract in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

(2) A custom or practice in effect at the time of such activity, at the establishment or other place where such employee is employed, covering such activity, not inconsistent with a written or non written contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

Id. at §254(b).

Thus, the PPA, too, acknowledges the primacy of the parties' bargain to govern what issues are to be deemed "principal activities" for purposes of determining the workday.[1] Nonetheless, here, the parties specifically excluded Clothes-Changing Activities from the workday in its entirety and nowhere said in their CBA, or had a custom or practice, that Travel Time would be compensated. Yet, irrespective of the CBA, the District Court suggests exactly that – despite the absence of any agreement by the union and employer to allow for payment of Travel Time or any custom allowing such payment, it can ignore the CBA and flout the PPA by inferring such a right, by interpreting Clothes-Changing Activities to be a "principal activity" under Section 254 of the PPA thereby requiring the payment of Travel Time. This is error.

B. Section 203(o)'s Text And Legislative History, In Particular, Show That CBA Determinations Excluding Clothes-Changing Activities From The Hours Of A Workday Should Govern Free From Judicial Or Regulatory Second-Guessing.

Here, the text of Section 203(o) itself expressly requires deference to a CBA's exclusion of Clothes-Changing Activities from the workday. It provides:

> (o) Hours Worked. – In determining for the purposes of sections 206 and 207 of this title the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week

[1] While US Steel addresses the text and history of Section 203(o) in its brief, *Amici* believe that the text and history of the NLRA and LMRA and the broader history of the FLSA and the PPA also are important here and reinforce US Steel's position.

> involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee.

29 U.S.C. §203(o). To disregard a CBA's handling of this subject would contravene Section 203(o)'s specific terms.[2]

Section 203(o)'s legislative history leaves no doubt that Congress intended to allow labor and management representatives to resolve through collective bargaining what otherwise could be contentious issues, including specifically whether Clothes-Changing Activities could be treated as part of the workday. Section 203(o) precludes governmental interference with this decision.

As US Steel notes in its brief, Section 203(o) arose in response to an ambiguity in the PPA regarding whether Congress intended to allow employers and employees to contract regarding the treatment of Clothes-Changing Activities. (US Steel Br. at 19-20, 32-40). Between 1947-49, that ambiguity resulted in claims on behalf of industrial employers that, by some reports, exceeded $1 billion. *See Sepulveda v. Allen Family Foods, Inc*., 591 F.3d 209 at 217 (4th Cir. 2009), *cert. denied*, 131 S. Ct. 187 (2010).

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[2] Because Section 203(o) expressly requires deference to a CBA, the principle noted in *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728 (1981), that parties cannot abridge by contract or otherwise waive their FLSA rights does not apply. Citing to both Sections 203(o) and 254 as places where the FLSA expressly references CBAs, the Supreme Court there noted that an arbiter *would* need to defer to a CBA as to these provisions, stating "[w]here plaintiff's claim depends upon application of one of these exceptions [including Sections 203(o) and 254], we assume without deciding that a court should defer to a prior arbitral decision construing the relevant provisions of the collective bargaining agreement." *Id.* at 741 n.19.

To resolve this ambiguity, Representative Christian Herter introduced the amendment that later became Section 203(o), which was enacted in 1949. Alluding to the immense amount of litigation that had occurred where courts had overridden CBA terms, Representative Herter explained that the amendment was "offered for the purpose of avoiding another series of incidents which led to the Portal-To-Portal Legislation." 95 CONG. REC. H. 11433 (daily ed. Aug. 10, 1949) (statement of Rep. Herter). He likewise was concerned that the DOL not be permitted to interfere with a CBA of which it did not approve and, therefore, violate the "sanctity of collective bargaining agreements." *Id.*

Most importantly here, he specifically invoked the importance of deferring to union and employer choices as to "what is to constitute a working day," regardless of whether different sets of employers and employees would reach different outcomes.

As he stated:

> At the present moment there is a twilight zone in the determinations of what constitutes hours of work which have been spelled out in many collective-bargaining agreements but have not necessarily been defined in the same ways.
>
> Let me be specific. In the bakery industry, for instance, which is 75 percent organized, *there are collective-bargaining agreements with various unions in different sections of the country which define exactly what is to constitute a working day and what is not to constitute a working day. In some of those collective-bargaining agreements the time taken to change clothes and to take off clothes at the end of the day is considered part of the working day. In other collective-bargaining agreements it is not so considered.* But, in either case the matter has been carefully threshed out between the employer and employee and apparently both are completely satisfied with respect to their bargaining agreements.
>
> The difficulty, however, is that suddenly some representative of the Department of Labor may step into one of those industries and say, "You have reached a

> collective-bargaining agreement which we do not approve. Hence the employer must pay for back years the time which everybody had considered was excluded as a part of the working day." That situation may arise at any moment. *This amendment is offered merely to prevent such a situation arising and to give sanctity once again to the collective-bargaining agreements as being a determining factor in finally adjudicating that type of arrangement.*

Id. (comments of Rep. Herter) (emphases added); *see Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976) (holding that "a statement of one of [a statute's] sponsors . . . deserves to be accorded substantial weight in interpreting th[at] statute").

As the *Sepulveda* court recognized, Section 203(o) represents a judgment that the issue of how to define the start and end of the workday should be left to the CBA process, explaining that, "[l]ike the Portal-To-Portal Act, Section 203(o) reflects Congress' intention to give private parties greater discretion to define the outer limits of the workday." 591 F.3d at 218.

Yet the District Court below would permit what Congress specifically rejected – using Clothes-Changing Activities that a CBA and Section 203(o) place beyond the "outer limits of the workday" as nonetheless triggering the start of the workday for Travel Time purposes. If the law requires employers to pay for Travel Time that occurs after Clothes-Changing Activities even where their CBA excludes such Activities from the workday, Section 203(o) would fail to accomplish Congress' goal of closing the loophole left open by the PPA. Employers would still have to pay for "activities" that Congress mandated in the PPA were generally not to be compensable (walking time from the locker room to the production area), making employers subject to unforeseen liability and litigation over activities that are peripheral to employees' work (this walking time).

1. Deference To A CBA Is Fair To Both Unions And Employers And Preserves The FLSA's Intent.

Giving sanctity to collective bargaining agreements between unions and employers as to whether Clothes-Changing Activities constitute part of the workday does not favor one party to a CBA over the other. There are many good reasons why employers would wish to pay workers more per hour in exchange for employees' agreement to exclude Clothes-Changing Activities from starting the workday. Courts have recognized that an employer may not want to compensate for Clothes-Changing Activities because such time might be difficult and expensive to capture and/or supervise adequately. *See, e.g., Lindow v. United States*, 738 F.2d 1057, 1063-64 (9th Cir. 1983). Similarly, employees might not have strong feelings regarding compensation for the time before they reach their workplace or station because many prefer to socialize, relax or have a snack before or after work, rather than face the immediate time pressure of being on the clock and supervised.

2. Until Recently, DOL Had Long Interpreted CBA Exclusions Of Clothes-Changing Activities To Also Exclude Such Activities From Being "Principal Activities" For The Continuous Workday Rule.

Until recently, the DOL had long concluded that where a CBA excluded Clothes-Changing Activities from the workday, such activities were not "principal activities" for purposes of the continuous workday rule. Thus, the DOL in 2002 recognized that "Congress' intent in enacting Section 203(o) [of the FLSA] . . . was to give a measure of deference on this aspect of wage-hour practice to the agreements and judgments shared by companies and their employees' duly-designated representatives for purposes of negotiating

the terms and conditions of employment." U.S. Dept. of Labor, Wage & Hour Div. Advisory Op. Ltr. No. FLSA 2002-2 at 3 (June 6, 2002).

On May 14, 2007, the DOL issued another opinion letter specifically stating its position that where Clothes-Changing Activities are excluded pursuant to Section 203(o), they may not be "principal activities" for measuring the boundaries of the workday. *See* U.S. Dept. of Labor, Wage & Hour Div. Advisory Op. Ltr. No. FLSA 2007-10 (May 14, 2007).[3]

C. Courts, Including This Court And The Supreme Court, Have Stressed That Collective Bargaining Gives Parties Freedom To Resolve Issues As They Deem Best.

Courts, including this Court and the U.S. Supreme Court, have repeatedly recognized that the collective bargaining process produces the fairest outcome for all parties and results in better wages and superior employment conditions for American workers.

In *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 245 (1978), the U.S. Supreme Court held that "[C]ontracts enable individuals [and organizations] to order their personal and business affairs according to their particular needs and interests."

Indeed, in *Merk v. Jewel Food Stores*, 945 F.2d 889 (7th Cir. 1991), this Court emphasized that CBAs play an important part in providing for industry "self-government."

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[3] In 2010, however, the DOL abandoned its longstanding position on this issue and, as US Steel notes in its Brief at pp. 43-47, its current position is inconsistent with Section 203(o)'s plain language as well as Congress' intent and applicable labor law authority from the Supreme Court and the lower courts. (US Steel Br. at 43-47).

In holding that employers and unions could not negotiate a secret side agreement at odds with a CBA, this Court stated:

> As the Supreme Court has recognized, a collective bargaining agreement is more than just a contract – it erects a system of industrial self-government. Indeed, certain terms of the collective bargaining agreement are deemed so important that their negotiation is mandated by law. Yet the laws regulating labor relations would have little substance if the central provisions of the collective compact could be nullified by means of secret side agreements.
>
> * * *
>
> To avert industrial strife, collective bargaining agreements must be more secure than garden variety contracts.

Id. at 893-94 (citations omitted). Here, a judicial override of a CBA exclusion of Clothes-Changing Activities from starting the workday would create the same risk of damage by undermining federal labor law and fomenting industrial strife as was posed by the secret side agreement in *Merk*. *See also Miron Constr. Co. v. Int'l Union of Operating Engrs. Local 139,* 44 F.3d 558, 562 (7th Cir. 1995) ("We show 'strong deference to the grievance procedures established by the parties to a collective bargaining agreement.' ") (citation omitted).

II. This Case Poses A Significant Threat To The Collective Bargaining Process Beyond Its Immediate Facts.

In passing Section 203(o), Congress indisputably wanted to let unions and employers "carefully thresh[ ] out" these issues including "what is to constitute a working day and what is not to." Congress wanted to "prevent such a situation" where a CBA could be

overridden by a regulator or court years later, resulting in an employer having to pay back wages for "time which everybody had considered was excluded as a part of the working day." It wanted to give "sanctity once again to the collective-bargaining agreements as being a determining factor in finally adjudicating that type of arrangement."

Implementing these goals, Congress mandated that Clothes-Changing Activities "shall be excluded" from hours worked when a CBA so provides. 29 U.S.C. §203(o). It would have been of little benefit to unions and employers if what they agreed to exclude from the workday under Section 203(o) somehow stayed part of the workday because of a strained reading of the term "principal activity" in the PPA. Indeed, it would particularly defy Congress' intent to order compensation for Travel Time on the ground that it follows Clothes-Changing Activities, when Congress specifically passed Section 203(o) to allow employers and employees to *remove* such Activities from their workday through a CBA.

However, if what the District Court suggested is right, what "everybody had considered was *excluded*" as part of the working day could instead once again be *included* as part of an employee's "principal activities" under the PPA. The court, not the parties, would define what "constitute[s] a working day." The parties' "careful threshing" would be for naught.

This Court should faithfully accord CBA decisions as to Clothes-Changing Activities the deference Section 203(o) plainly requires.

A. To Accept The District Court's Interpretation Of The Law Would Undermine Parties' Confidence In Collective Bargaining.

As noted above, Congress passed the PPA due to judicial negation of CBA terms. It then passed Section 203(o) when a PPA loophole led to a flood of litigation concerning the treatment of Clothes-Changing Activities. Now, should the Court hold that Clothes-Changing Activities, which are outside the workday for purposes of Section 203(o), may nonetheless still "start" the workday for PPA purposes, the very "evils" Congress was concerned about 60-plus years ago will reemerge. *See* 29 U.S.C. §254(b).

If courts can override a CBA's settled terms as to whether Clothes-Changing Activities are part of the start or end of the workday, they can revisit, reinterpret and override every other provision as well. After all, here the terms between US Steel and its union remained in basic form in the CBA for 64 years.

In the next case, perhaps a court will negate a promise an employer makes.[4] The result will be that both parties will be less trusting of the CBA process because they will not know which terms a court or regulators will leave alone and which they will rewrite.

Moreover, parties will not want to make concessions if they know that courts or regulators may later require them to honor the concession, but deny them the bargained-for consideration provided by the other party received in exchange.

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[4] For example, here the union negotiated with US Steel in its most recent CBA for additional compensation for washing up at the conclusion of the workday for those employees who work in the coke plant. (US Steel Br. at 13).

In its findings as to the PPA, Congress found that a weakening of voluntary collective bargaining would lead to greater industrial strife. This is completely avoidable here if this Court reads Section 203(o) as Congress intended – to foreclose the use of Clothes-Changing Activities as the start of a workday when a CBA, or the customs or practices under a CBA, exclude such activities from compensable work time.

B. To Accept The District Court's Interpretation Of The Law Would Create An Administrative Nightmare And Foster Unnecessary Litigation.

If the District Court is correct and Clothes-Changing Activities may be excluded from the workday but included as "principal activities" for purpose of the continuous workday rule, an administrative nightmare will result, unleashing a flood of unnecessary litigation.

As US Steel's brief illustrates, like many employers, it has negotiated a CBA that provides for a definite start to a workday – when a worker is at his or her workstation at the beginning of a shift – as well as a definite end to that workday – when the shift ends eight hours later. This was also the very same start and end of the workday envisioned by Congress when it enacted the PPA to eliminate the compensability of Travel Time. If, however, Clothes-Changing Activities may be considered to start or end the workday, then neither employees nor employers will have certainty as to what portion of Travel Time to the workstation at the start of a shift or from the workstation at the end of a shift is compensable. Some employees may walk faster than others. Some may socialize or dawdle on the way back to lockers. Perversely, the more slothful might be entitled to more

compensation than their more efficient colleagues. The inherent disparities may lead to resentment among workers.

At present, it is easy for US Steel to verify that its employees are adhering to its established work schedule – its supervisor can see workers at their workstations, and if they are tardy, even if on premises, they are not compensated for this. By contrast, employers will not necessarily have observers or timekeepers able to measure Travel Time. Also, now employers may have to tease out what time should be deducted for Travel Time for a coffee break or socializing. Whether one is tardy might become debatable.

All of this is inappropriate and none of it would be necessary if the clear terms of CBAs are given their proper deference.

C. It Is Especially Important To Protect The Collective Bargaining Process In This Time Of Economic Crisis.

This is a time of great economic crisis in America. In the past, such as following the Great Depression when it enacted the FLSA, Congress stressed the importance of collective bargaining in providing the best possible wages and lifestyle for workers. Now is not the time to undermine the collective bargaining process or to inject courts into the relationships between employers and unions.

This is especially true, since in today's employment culture, employers generally are committed to the CBA process. Likewise, unions today are without question sophisticated advocates for their members. In this culture, the goal should be to create and maintain jobs. There is no reason for courts to second-guess the bargains struck between unions and

employers and add unexpected expenses to the cost of maintaining a workforce that might necessitate reductions.

CONCLUSION

Amici curiae respectfully urge this Court to adopt the position of US Steel that donning, doffing and washing activities excluded from "hours worked" through a collective bargaining agreement are not principal activities for purposes of starting or ending the continuous workday rule.

Respectfully submitted,

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CERTIFICATE PURSUANT TO FED. R. APP. P. 32(a)(7)(c)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,882 words, excluding the part of the brief exempted by Fed. R. App. P. 32(1)(7)(B)(iii).

This brief complies with the typeface requirements of Circuit Rule 32(b) and the type size requirements of Fed. R. App. P. 32(a)(6) because this brief has been professionally printed.

/s/ David B. Goroff
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August 29, 2011

CERTIFICATE OF SERVICE

I hereby certify that on August 29, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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