

No. 12-99

IN THE
Supreme Court of the United States

UNITE HERE LOCAL 355,
Petitioner,

v.

MARTIN MULHALL,
Cross-Petitioner and Respondent,

and

HOLLYWOOD GREYHOUND TRACK, INC. d/b/a
MARDI GRAS GAMING,
Respondent.

**On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit**

**CONDITIONAL CROSS-PETITION FOR
WRIT OF CERTIORARI**

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QUESTION PRESENTED

Section 302(a)(2) of the Labor Management Relations Act makes it unlawful for employers “to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value . . . to any labor organization,” with exceptions inapplicable here. 29 U.S.C. § 186(a)(2). The question presented is whether intangible things can be “deliver[ed]” under this statute.

PARTIES TO THE PROCEEDINGS BELOW

The parties before the United States Court of Appeals for the Eleventh Circuit are Petitioner Unite Here Local 355, Respondent and Cross-Petitioner Martin Mulhall, and Respondent Hollywood Greyhound Track, Inc., d/b/a Mardi Gras Gaming.

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Martin Mulhall respectfully files this conditional cross-petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit if the Court grants the union's petition.

OPINIONS BELOW

The Eleventh Circuit's opinion is reported at *Mulhall v. Unite Here*, 667 F.3d 1211 (11th Cir. 2011) ("*Mulhall II*") (Pet. 1a-12a) (2-1 decision), rehearing en banc denied 25 April 2012 (Pet. 61a-62a). A previous appellate decision is reported at *Mulhall v. Unite Here*, 618 F.3d 1279 (11th Cir. 2010) ("*Mulhall I*") (Pet. 34a-60a). The opinions of the district court dated 24 January 2011 (Pet. 13a-23a) and 22 April 2009 (Pet. 24a-33a) are not reported.

JURISDICTION

On 18 January 2012, the Eleventh Circuit entered judgment reversing the district court's order dismissing the complaint for failure to state a claim. (Pet. 12a). A petition for rehearing en banc was denied on 25 April 2012 (Pet. 61a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 302 of the Labor Management Relations Act, ("LMRA") 29 U.S.C. § 186, provides in relevant part:

(a) [Payment or lending, etc., of money by employer or agent to employees, representatives, or labor organizations] It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

* * *

(b) [Request, demand, etc., for money or other thing of value]

(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

* * *

STATEMENT OF THE CASE

This is an action by an employee, Martin Mulhall, to stop a union from demanding assistance from his employer with unionizing him and his co-workers. The case is before the Court on the union's petition for review of the Eleventh Circuit's decision that the district court erroneously granted a motion to dismiss for failure to state a claim.

Mr. Mulhall's employer, Mardi Gras Gaming, entered into a Memorandum of Agreement with a union, Unite Here Local 355, in which it agreed to assist Unite with unionizing its employees in exchange for promises of labor peace and Unite's support of a ballot initiative regarding casino gaming. (Compl., ¶¶ 9-11; Pet. 66a); (Agreement; Pet. 78a-86a). Unite has demanded and attempted to compel Mardi Gras to enforce the Agreement's organizing provisions. (Compl., ¶¶ 12-13; Pet. 67a); *see also* *Unite Here Local 355 v. Hollywood Greyhound Track*,

Inc., No. 12-61135 (S.D. Fla. 2012) (union suit to compel arbitration).

Mulhall alleges that Unite is violating § 302(b)(1) of the LMRA, 29 U.S.C. § 186(b)(1), by requesting and demanding from his employer three “thing[s] of value,” the giving of which is prohibited under § 302(a)(2), 29 U.S.C. § 186(a)(2): (1) confidential information about Mardi Gras’ nonunion employees, including their home addresses and job classifications; (2) use of Mardi Gras’ private property for organizing; and (3) a gag-clause on any speech or action by Mardi Gras that states or implies opposition to unionization. (Compl., ¶ 37; Pet. 74a).

The district court dismissed Mulhall’s complaint for lack of standing. (Pet. 29a-33a). A unanimous Eleventh Circuit reversed that dismissal in *Mulhall I*. (Pet. 34a-60a). On remand, the district court dismissed the complaint on the merits. (*Id.* at 13a-23a). The Eleventh Circuit again reversed in *Mulhall II* (Pet. 1a-12a), and subsequently denied Unite’s petition for rehearing en banc. (Pet. 61a-62a).

In *Mulhall II*, the panel majority reasoned that “[i]t seems apparent that organizing assistance can be a thing of value.” (Pet. 7a). However, the court found that “intangible organizing assistance cannot be loaned or delivered because the actions ‘lend’ and ‘deliver’ contemplate the transfer of tangible items,” but that an intangible can act as a “payment” if “its performance fulfills an obligation.” (*Id.* at 7a-8a). Thus, according to the court, intangible forms of organizing assistance violate § 302 only “if used as valuable consideration in a scheme to corrupt a union or to extort a benefit from an employer.” (*Id.* at 8a). Overall, the court held “Mulhall’s allegations . . . sufficient to support a § 302 claim.” (*Id.*).

On 20 July 2012, Unite petitioned for certiorari over whether union demands for the three forms of organizing assistance at issue can violate § 302. Mulhall here conditionally cross-petitions regarding the Eleventh Circuit’s conclusion that the word “deliver” in § 302 applies only to “the transfer of tangible items.” (*Id.* at 7a).

REASONS FOR GRANTING THE WRIT

The question of whether intangible types of organizing assistance—which here include control over Mardi Gras’ communications and potentially the right to use its property¹—can be “deliver[ed]” under § 302(a) is an issue encompassed within the judgment over which Unite petitions for review. However, out of an abundance of caution and to eliminate any potential disputes, Mulhall submits this conditional cross-petition to ensure that the entirety of the lower court’s opinion is reviewed by this Court. If the union’s petition is granted, this cross-petition should also be granted for two reasons.

First, this Court cannot fully consider the question presented in Unite’s petition if the meaning of the word “deliver” is not an issue before the Court. Section 302 makes it unlawful for employers to “to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value . . . to any labor organization.” 29 U.S.C. § 186(a)(2). How the word “deliver” is construed can impact whether § 302 encompasses intangible organizing assistance.

¹ The list of information about nonunion employees required under ¶ 8 of the Agreement (Pet. 81a), is a tangible thing that can be “deliver[ed]” under the Eleventh Circuit’s holding.

Second, the term “deliver,” properly construed, applies to intangibles. “Delivery” is broadly defined as “[t]he formal act of transferring something, such as a deed; *the giving or yielding possession or control of something to another.*” Black’s Law Dictionary, 494 (9th ed. 2009) (emphasis added); *see also* Webster’s Dictionary, 481 (unabridged) (2d ed. 1980) (“deliver . . . to give or transfer; to put into another’s possession or power, to commit, to pass from one to another”). A company clearly can “deliver” to a union control over its private property and control over its communications. The Eleventh Circuit’s conclusion to the contrary is erroneous, unsupported, and should be reversed.

For this reason, if the petition for certiorari is granted, this conditional cross-petition should also be granted.

Respectfully submitted,

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