Nos. 12-99, 12-312

In The
Supreme Court of the United States

UNITE HERE LOCAL 355,

Petitioner,

v.

MARTIN MULHALL; HOLLYWOOD GREYHOUND TRACK, INC. d/b/a/ MARDI GRAS GAMING,

Respondents.

MARTIN MULHALL,

Petitioner,

v.

UNITE HERE LOCAL 355; HOLLYWOOD GREYHOUND TRACK, INC. d/b/a/ MARDI GRAS GAMING,

Respondents.

On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

UNITE HERE LOCAL 355's REPLY TO RESPONDENT MARDI GRAS GAMING'S BRIEF IN OPPOSITION

RICHARD G. MCCRACKEN*
ANDREW J. KAHN
PAUL L. MORE
DAVIS, COWELL & BOWE LLP
595 Market Street, Suite 1400
San Francisco, CA 94105
(415) 597-7200
rmccracken@dcbsf.com

Counsel for Respondent UNITE HERE Local 355

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

INTRODUCTION

Petitioner UNITE HERE Local 355 submits this Reply to Respondent Mardi Gras Gaming's Brief in Opposition to the petitions. Mardi Gras argues that the union's petition in No. 12-99 and Mulhall's conditional cross-petition in No. 12-312 should be denied as moot, claiming that the neutrality agreement that Mulhall challenges has expired. But in collateral proceedings, the union and Mardi Gras are litigating Mardi Gras's obligation to arbitrate violations of that neutrality agreement. An arbitrator may well extend the term of the neutrality agreement as a remedy for those violations – two arbitrators have already done so. No court has held that Mardi Gras's contractual obligations have terminated.

Even if the neutrality agreement were currently expired and unenforceable, the relief that Mulhall seeks in his lawsuit goes beyond this particular agreement. Mulhall seeks a permanent injunction barring the union from ever "requesting" or "demanding" information about Mardi Gras employees, neutrality toward unionization, or access to Mardi Gras's facilities. App. 75.

The parties have an ongoing, concrete interest in Mulhall's § 302 claims.

SUPPLEMENTAL STATEMENT OF THE CASE

Mardi Gras and the union entered into the neutrality agreement in August 2004. App. 85. By its

terms, the agreement did not come into effect unless slot machines were installed and opened to the public at Mardi Gras's gaming facility. App. 85. Mardi Gras and the union agreed that once this occurred, the neutrality agreement would remain in effect for four years. App. 85.

Mardi Gras complied with the neutrality agreement for some time after it installed slot machines in December 2006. Beginning in 2008, however, it refused to supply the union with updated lists of its employees' names and addresses. When Mardi Gras refused to arbitrate this contractual violation, the union petitioned a federal district court to compel arbitration. *See* App. 38; *UNITE HERE Local 355 v. Hollywood Greyhound Track, Inc.*, Case No. 08-cv-61655 (S.D. Fla. 2008). The district court compelled Mardi Gras to arbitrate. App. 39. Arbitrator Arnold Zack subsequently held that: (1) Mardi Gras violated the neutrality agreement; (2) Mardi Gras first installed slot machines in December 2006; and (3) the proper remedy for Mardi Gras's violations was to extend the agreement's term for one year, to December 31, 2011.

Mardi Gras petitioned the district court to vacate this award, and the union moved to confirm it. The court confirmed the award in most respects. It refused to confirm the extension of the agreement's duration, holding that the parties had not given the arbitrator jurisdiction to award this remedy. *Hollywood Greyhound Race Track, Inc. v. UNITE HERE Local 355*, Case No. 09-cv-61760, Order (S.D. Fla. Aug. 6, 2010), at p. 6; *see* App. 39.

In 2009, Mardi Gras distributed flyers to its employees attacking the union and accusing union officials of greed and waste. Because this violated Mardi Gras's agreement to remain neutral, the union again sought arbitration. The parties held a hearing before Arbitrator Jerome Ross. Arbitrator Ross issued an award on April 23, 2010, holding that Mardi Gras violated the neutrality agreement by attacking the union. He ordered that the agreement's term be extended for one year beyond its expiration date as a remedy. The union subsequently petitioned to confirm this award, which a federal district court did on June 30, 2011. *UNITE HERE Local 355 v. Hollywood Greyhound Track, Inc.*, Case No. 11-cv-60047 (S.D. Fla. 2011).

Beginning in October 2011, Mardi Gras began interrogating employees about their union sympathies and attacking the union. In November 2011, Mardi Gras terminated ten employees who were known supporters of the union. Both actions violated the neutrality agreement. On November 15, 2011, the union sent a letter to Mardi Gras demanding arbitration. Mardi Gras refused to arbitrate these violations as well.

On June 7, 2012, the union petitioned to compel arbitration of the employer's October and November 2011 violations. *UNITE HERE Local 355 v. Hollywood Greyhound Track, Inc.*, Case No. 12-cv-61135 (S.D. Fla.). That action is pending.

REASONS FOR GRANTING THE WRITS

I. Mardi Gras Has Ongoing Obligations Under the Neutrality Agreement.

The most obvious problem with Mardi Gras's mootness argument is that it is currently litigating the status of the neutrality agreement in a different forum. "A case becomes moot only when it is impossible for a court to grant '"'any effectual relief whatever' to the prevailing party."'" *Knox v. Serv. Employees Int'l Union, Local 1000*, 132 S.Ct. 2277, 2287 (2012) (quoting *Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000), in turn quoting *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992)). "[A]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Ellis v. Railway Clerks*, 466 U.S. 435, 442 (1984). Mulhall and the union have a concrete interest in the outcome of Mulhall's litigation because Mardi Gras has ongoing obligations under the neutrality agreement.

Mardi Gras's most recent violations of the neutrality agreement are subject to arbitration, and an arbitrator will likely remedy these violations by extending the neutrality agreement's term. Violations of labor-management agreements that take place during the agreement's term are subject to post-expiration arbitration. *Nolde Bros. v. Local 358, Bakery Workers*, 430 U.S. 243, 251 (1977); *Litton Financial Printing v. NLRB*, 501 U.S. 190, 205-06 (1991). Mardi Gras's most recent violations took place

while the neutrality agreement was still in effect. It is therefore irrelevant whether the agreement "expired by its own terms prior to the Petition for Writ of Certiorari." *Cf.* Mardi Gras Opp. Br., at 3.

In the union's pending action to compel arbitration, Mardi Gras argues that the neutrality agreement in fact expired in October 2011, prior to its violations. *See* Mardi Gras Opp. Br., at 3. But the neutrality agreement contains a broad arbitration clause, covering "any disputes over [its] interpretation or application[.]" App. 84. The question of whether the neutrality agreement had expired at the time of Mardi Gras's October and November 2011 violations is a matter of contract interpretation for an arbitrator. *Howsam v. Dean Witter Reynolds Inc.*, 537 U.S. 79, 85 (2002); *see, e.g.*, *UNITE HERE Local 217 v. Sage Hospitality Resources*, 642 F.3d 255, 262 (1st Cir. 2011); *Abram Landau Real Estate v. Bevona*, 123 F.3d 69, 74 (2nd Cir. 1997); *Houston General Ins. Co. v. Realex Group, N.V.*, 776 F.2d 514, 516-17 (5th Cir. 1985); *McKinney v. Emery Air Freight*, 954 F.2d 590 (9th Cir. 1992); *Montgomery Mailers' Union No. 127 v. Advertiser Co.*, 827 F.2d 709, 713-14 (11th Cir. 1987).[1]

---

[1] Regardless of whether a court or arbitrator decides the issue, Mardi Gras is unlikely to prevail in its argument that the neutrality agreement expired in October 2011. A previous arbitration award – confirmed by a federal district court – held that the agreement ran through December 31, 2010. *Hollywood Greyhound Race Track, Inc. v. UNITE HERE Local 355*, Case No. 09-cv-61760 (S.D. Fla. 2010). A subsequent award – also confirmed by a federal district court – extended that expiration

(Continued on following page)

A central purpose of the agreement is to ensure the employer's neutrality toward unionization during any organizing drive. An arbitrator is likely to remedy Mardi Gras's violations of its neutrality pledge by extending the agreement's term, as two arbitrators have done previously.[2] In any case, no court or arbitrator has held that Mardi Gras's obligations under the neutrality agreement have ceased.

Mardi Gras admits that the neutrality agreement is far from a dead letter, and that further arbitration and the extension of the agreement's term are possible. Mardi Gras Opp. Br., at 4. This is a concession that the petition is not moot.[3]

---

date for one year to remedy Mardi Gras's violations. *UNITE HERE Local 355 v. Hollywood Greyhound Track, Inc.*, 11-cv-60047 (S.D. Fla. 2011). Those decisions are *res judicata*.

[2] The propriety of this remedy as a way to help restore the benefit of a bargain is well-established. *See, e.g., Levitt Corp. v. Levitt*, 593 F.2d 463, 469 (2nd Cir. 1979); *Capelouto v. Orkin Exterminating Co. of Fla., Inc.*, 183 So.2d 532, 534 (Fla. 1966).

[3] *Local No. 8-6, Oil, Chemical and Atomic Workers International Union v. Missouri*, 361 U.S. 363, 366 (1960) is obviously distinguishable. *Cf.* Mardi Gras Opp. Br., at 4. There, the Court held that the parties' separate litigation of different legal issues did not rescue the moot challenge to an indisputably expired injunction. Here, the collateral proceedings address whether the neutrality agreement is expired or enforceable at all.

II. Mulhall Seeks to Enjoin the Union From Requesting or Demanding Any Future Neutrality Agreement.

The relief that Mulhall requests goes beyond the existing neutrality agreement. Mulhall seeks an order enjoining the union from ever "*requesting*, *demanding*, or receiving" information about Mardi Gras's employees, access to Mardi Gras's property, or Mardi Gras's neutrality on the question of its employees' choice regarding union representation. App. 75 (emphasis added). Mulhall also requests declaratory judgment that each of these is a "thing of value" under § 302. App. 75. Mulhall wants not just to invalidate a particular neutrality agreement, but to prohibit the union from ever "demanding" Mardi Gras's agreement to one again in the future.

Accordingly, even if Mulhall's request for an injunction against enforcement of the neutrality agreement were mooted by that agreement's expiration, Mulhall's lawsuit – and therefore the union's petition – would not be moot. *See, e.g.*, *Powell v. McCormack*, 395 U.S. 486, 499-00 (1969) (mootness of "primary" relief sought did not moot entire case if other forms of relief available); *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 121-22 (1974) (district court had a duty to decide the merits of the declaratory judgment claim even though the request for an injunction had become moot).

CONCLUSION

For the foregoing reasons, the petitions are not moot. The Court should grant them.

Respectfully submitted,

RICHARD G. MCCRACKEN*
ANDREW J. KAHN
PAUL L. MORE
DAVIS, COWELL & BOWE LLP
595 Market Street, Suite 1400
San Francisco, CA 94105
(415) 597-7200
rmccracken@dcbsf.com

Counsel for Respondent
UNITE HERE Local 355

**Counsel of Record*

December 4, 2012