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UNITED STATES DEPARTMENT OF LABOR
WASHINGTON, D.C.

UNITED STATES DEPARTMENT OF LABOR, OFFICE OF APPRENTICESHIP TRAINING, EMPLOYER AND LABOR SERVICES, Prosecuting Party, v. CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS and CALIFORNIA APPRENTICESHIP COUNCIL, Respondents.	Case No. 2002 - CCP - 1 CALIFORNIA APPRENTICESHIP COUNCIL'S REPLY BRIEF

Respondent California Apprenticeship Council ("CAC") submits this brief in response to the amici briefs of Western Electrical Contractors Association, Inc. ("WECA"), San Diego Associated Builders and Contractors, et al ("ABC San Diego") and Associated Builders and Contractors, Inc. ("ABC National").

CAC adopts all the positions and arguments made in the reply brief of California Department of Industrial Relations ("DIR").

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ARGUMENT

I

APPRENTICESHIP LAWS ARE INTENDED TO PROTECT AND ENCOURAGE APPRENTICES, NOT TO PROMOTE FREE MARKET COMPETITION AMONG APPRENTICESHIP TRAINING PROGRAMS

The fundamental error in the briefs of the three amici is the assumption that the purpose of the Fitzgerald Act (29 U.S.C. section 50) is to promote free market competition among apprenticeship training programs.

Apprenticeship long has been regulated in California and in other jurisdictions. These laws reflective a legislative belief that apprentices must be protected from two dangers: (1) programs that provide inadequate training; and (2) programs that exploit apprentices as a source of cheap labor without offering realistic prospects of employment. As shown in CDIR's briefs, the "need" requirement in California Labor Code section 3075(b) protects apprentices from these dangers.

Amici assume that the Fitzgerald Act operates as some sort of federal antitrust law intended to give new apprenticeship programs an open entry to the marketplace. CAC does not deny that competition among programs may benefit society. But the Fitzgerald Act does not make the goal of fostering competition more important than the goal of protecting apprentices.

Furthermore, there already is competition in California between union and non-union programs. ABC's non-union programs are offered throughout California. With one exception, CDIR has approved <u>every</u> non-union apprenticeship program that has applied for approval since the enactment of section 3075(b), and the one exception involved a program that had not made proper arrangements for classroom training.

II

OATELS HAS NO RIGHT OF PRIOR APPROVAL

In arguing that OATELS has the right of prior approval over all changes in California's statutes and regulations concerning apprenticeship, amici overlook the following:

1. Neither the Fitzgerald Act nor the implementing regulations, 29 C.F.R. section 29, provide for prior approval.

2. There is no process for obtaining prior approval. To whom must a proposed change be

submitted? Under what deadlines? If the request is denied, what are the administrative appeal remedies? What criteria does OATELS use to determine whether to grant prior approval?

The realities of apprenticeship regulation justify Congress' decision not to enact legislation, and the Secretary's decision not to promulgate regulations, that give OATELS a right of prior approval. There are 31 SAC approved states and other jurisdictions. (Stipulation of Facts, ¶ 9.) If the other jurisdictions are like California, each of them frequently changes its laws and regulations, and most of these changes are of minor significance and involve matters that do not in anyway conflict with federal law. It would be burdensome on the states to have to wait for OATELS' bureaucracy to process each application for each change.

For example, CAC has recently faced the problem of how to distribute certain unspent training fund contributions. Under California law, a public works contractor that employs apprentices must pay to CAC an amount that is determined to be the equivalent of the training funds contributions that are paid on private works in the geographic area. CAC is required to distribute these funds among approved programs in the area. CAC intends to solve the problem by the promulgation of a new regulation. (Proposed 8 C.C.R. section 230.2(d).) This regulation is of no concern to OATELS, and OATELS has not argued that the adoption of the regulation is a violation of OATELS' supposed right of prior approval. What purpose would be served by requiring CAC to submit the regulation to OATELS? How long would CAC have to wait before the approval was received?

This is not to say that OATELS is powerless to act against changes in state laws that violate the Fitzgerald Act or its implementing regulations. If OATELS dislikes a state law, it may bring a derecognition proceeding, as it has done against California in this case. Derecognition is a sufficient stick to ensure that states will not violate federal law while acting under federal authority. A right of preapproval is superfluous.

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III
CAC AND CDIR DO NOT DELAY THE PROCESSING OF APPLICATIONS FOR NEW PROGRAMS

OATELS argues that CAC and CDIR take an average of three years to process applications of new programs. This is false. CDIR is required to act upon an application for a new program within 90 days, and CAC must decide any appeal from CDIR's decision no later than two quarterly meetings after the filing of the appeal. (8. C.C.R. section 212.2.)

Some years ago CAC estimated that under prior regulations three years was the average processing time of applications for new programs. CAC corrected this problem by the promulgation of the current regulation.

IV
THE AMICI'S BRIEFS CONTAIN FACTUAL ERRORS

1. ABC San Diego

ABC San Diego complains that California has approved only four new or expanded programs "since the enactment of the needs test,...." (ABC San Diego's brief, p. 5.) But only five programs have applied for approval during this period. Since each of these programs was non-union, ABC San Diego has hardly proved that the needs test has been used to discriminate against non-union programs.

According to ABC San Diego, Exhibit 4 to its brief proves that California takes much less time to approve new union programs than it does to approve new non-union programs. (ABC San Diego brief, pp. 9-10.) But Exhibit 4, which is entitled "Revision Of Approved Standards," is not an application for approval of a new program. Instead, it is an application for revision of the standards[1/] of an existing program. All Exhibit 4 proves is that CDIR acted quickly to allow a change in the apprentice wage scale of the San Diego Sound Technician union program. It is not surprising that an application to make a minor change in the standards of an existing program would take less processing time than does the approval of an entirely new program.

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1. A program's "standards" are the equivalent of the by-laws and articles of incorporation of a corporation.

2. WECA

WECA's brief describes its unsuccessful effort to make an illegal expansion of the geographic area of its operations. Briefly, after being approved in 1992 to operate only in eleven northern California counties, WECA began operating throughout the State. CAC then issued an order that stopped the illegal expansion. For two reasons, this history does not support WECA's argument that the need requirement is discriminatory.

First, CAC did not rely on the need requirement as a basis for denying the geographic expansion. Instead, CAC simply ruled that WECA's expansion had not been properly approved. Unapproved geographic expansion is an important issue because one of the components of apprenticeship training is classroom training. Programs typically offer classroom training through community and junior colleges in their approved geographic areas. If a program operates outside its approved geographic area, it will recruit apprentices who have to travel long distances to attend the classroom training. Since classroom training usually takes place at night after the end of the work day, the danger is that apprentices will not have the time or the will to attend classes. The approval process ensures that a program offers classroom training that is close to where he apprentices live. CAC's reasons for not allowing an unapproved geographic expansion were upheld in *Independent Roofing Contractors v. California Apprenticeship Council*, 114 Cal.App.4th 1330 (2003), a case involving virtually identical facts.

Second, the facts show that WECA has not been treated unfairly. The unapproved expansion clearly violated California law. (*Id.)* WECA waited four years before applying for approval. When it did submit an application, the application was approved by CDIR. It is true that a competing union program appealed The CDIR approval to CAC. However, a panel of CAC members has recommended that CAC deny the appeal. The appeal will be decided at CAC's October, 2004 meeting.

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3. ABC National

ABC National wrongly argues that *Electrical Joint Apprenticeship Committee v. Macdonald* 949 F.2d 270 (0th Cir. 1991) struck down a state law that discriminated against non-union programs. The decision actually holds that a state may not offer benefits to programs that have been approved by the state while denying the same benefits to programs that have been approved by OATELS. The decision has nothing to do with the struggles between union and non-union programs.

CONCLUSION

For the reasons set forth above and in the briefs of CDIR, The motion for summary judgment of CAC and CDIR should be granted and OATELS' motion for summary judgment should be denied.

DATED: October 4, 2004

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