No. 02-896

In The
Supreme Court of the United States

FLUOR HANFORD, INC., AND
FLUOR FEDERAL SERVICES, INC.,

Petitioners,

v.

SCOTT BRUNDRIDGE, DONALD HODGIN,
JESSIE JAYMES, CLYDE KILLEN, PEDRO NICACIO,
SHANE O'LEARY, RAYMOND RICHARDSON,
JAMES STULL, RANDALL WALLI,
DAVID FAUBION, AND CHARLES CABLE,

Respondents.

On Petition For Writ Of Certiorari
To The Court Of Appeals Of Washington

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Do wrongful discharge actions for violation of state health and safety laws fall within the "local interests" exception to preemption under the National Labor Relations Act?

Does the Federal Arbitration Act compel arbitration of employee claims based on rights arising outside of a collective bargaining agreement if the CBA includes no express reference to such rights and if it mandates arbitration of "any disputes that arise out of the interpretation or application of this agreement"?

LIST OF PARTIES

Petitioner is Fluor Federal Services, Inc.

Respondents include Scott Brundridge, Donald Hodgin, Jessie Jaymes, Pedro Nicacio, Shane O'Leary, Raymond Richardson, James Stull, Randall Walli, David Faubion, and Charles Cable and are all represented by Sheridan and Baker. Clyde Killen, who is also a respondent, is not represented by Sheridan and Baker.

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STATEMENT OF THE CASE

In May 1997, five of the respondents herein, pipefitters Clyde Killen, Pedro Nicacio, Shane O'Leary, James Stull, and Foreperson Randall Walli, in addition to two other pipefitters, Daniel Phillips and Terry Holbrook, were employees of petitioner working on a crew at Hanford's 200-West area assigned to the W-058 project. These five pipefitters were told by petitioner's management to install and use underrated valves in a pipe that was being pressure tested with thousands of gallons of water, and in close proximity to hazardous waste storage tanks. CP 345-348.

The valves were underrated, because they were not rated to withstand the pressure to which they would be subjected, if management's order had been implemented. CP 345-348. The five pipefitters were concerned that use of the valves would result in their failure, which could result in the injury or death of workers who would be stationed near the valves, as had happened previously under similar circumstances at petitioner's facility. CP 499.

After discussions between the pipefitters and petitioner's management, it was agreed that the valves would be installed and tested on the condition that no employees were within 100 feet of the valves during the test. Managers then changed their position and insisted that the pipefitters stand near the valves during the test. The five pipefitters refused to use the valves during the test. CP 345-348.

Petitioner's Manager Miller then arrived at the site and yelled profanities at the five pipefitters for refusing to use the underrated valves. Following discussions between the pipefitters and Miller about the underrated valves, petitioner's agents located properly rated valves that were

on-site. The five pipefitters then installed the valves and conducted the pressure test. CP 345-348.

Several days later, without explanation, Foreperson Walli was demoted – which caused him to resign – and most of the crew was laid off. CP 348. Manager Miller told General Foreperson Nichols that he had manipulated the personnel work schedules in order to dismiss Pipefitter Walli and others in Walli's crew, because he was "tired of all the safety issues being raised." CP 500. Referring to the layoffs, Miller bragged to another manager that he got rid of his problems all at once. CP 680-1.

The pipefitters were represented by Local No. 598 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, and worked for petitioner under a collective bargaining agreement, the Hanford Site Stabilization Agreement (the CBA). CP 157-210.

On June 20, 1997, Union Local 598 filed a grievance with petitioner in response to the layoffs. CP 152-210, 582. The petitioner maintained at the time of filing that "no grievable action ha[d] taken place." CP 582. The union could not adequately investigate the layoffs, since it lacked discovery tools such as subpoena power. In addition, under the CBA, retaliatory layoff is much harder to prove than wrongful termination. CP 855-6. That is because the CBA does not require management to state a reason for a layoff; the CBA does require the employer to state a reason for a termination.

On February 8, 1998, the union withdrew the grievance, because it lacked the "ability to provide direct evidence of a violation of the Hanford Site Stabilization

Agreement." CP 1454. No further grievances were filed by the Union for subsequent layoffs of the respondents.

On August 4, 1997, pipefitters Randall Walli, Clyde Killen, Pedro Nicacio, Shane O'Leary, James Stull, Daniel Phillips, and Terry Holbrook filed a complaint with the U.S. Department of Labor under 42 U.S.C. § 5851, the employee protection provisions of the Energy Reorganization Act (Act), alleging that Fluor had retaliated against them for engaging in protected whistleblowing activity. CP 652. An investigation by the Department of Labor (DOL) ensued. Fluor claimed that the safety issues raised were not within the ambit of the ERA on the grounds that the DOL lacked jurisdiction to investigate. CP 667. The DOL disagreed and found that Fluor had retaliated against the pipefitters in violation of the Act and recommended immediate reinstatement, back pay, compensatory damages, and attorney fees. CP 658-672, 677.

Fluor appealed the DOL findings and an administrative hearing was scheduled pursuant to the Act. Just prior to the hearing, petitioner settled with the respondents. CP 1455-56, Resp. Appendix at 14a-15a. Pursuant to the settlement, Fluor agreed to reinstate the pipefitters ["refusing pipefitters"] and to pay compensation covering back pay, compensatory damages and attorney fees. CP 1455-1456.

The facts pertaining to the June 1997 layoffs that led to the DOL Fluor settlement do not form the basis for the wrongful discharge claims at issue here. CP 247-255. However, they are the origin of the retaliation that followed reinstatement, which does form the basis for the respondents' individual wrongful discharge claims.

At the end of February 1998, after the settlement agreement was signed, Fluor managers held a meeting

with the pipefitter forepersons and represented that the DOL settlement expressly *required* that seven current pipefitters be laid off and that the seven pipefitters whom the DOL found to have suffered retaliation be reinstated. CP 778. The representation was false.

Relying on this misrepresentation – which indicated that the refusing pipefitters had secured their own jobs and settlement benefits at the expense of the jobs of their union brothers – twelve forepersons and the general foreperson drafted and signed a petition to protest the forced reinstatement of the seven pipefitters they understood to be required by the settlement. CP 896, Resp. Appendix at 17a. The petition, dated March 4, 1998, listed seven pipefitters selected for layoff. CP 896, Resp. Appendix at 17a.

Four of the pipefitters listed were the pipefitter respondents who had individually supported the refusing pipefitters. Three or four days after the layoffs of those pipefitters, respondent Pipefitter Scott Brundridge began to voice his opinion in the lunch trailer that all of the remaining pipefitters should stand up for safety in support of their Union brothers. CP 685-686. Respondent Pipefitters Donald Hodgin and Scott Brundridge also voiced their support of the refusing pipefitters in the lunch trailer, in the presence of the other workers and forepersons. CP 698-699. Pipefitter Ray Richardson called the Department of Energy hotline to express his safety concerns about the valves and his disapproval of the layoffs of the refusing pipefitters. CP 698-699, 736. Respondent pipefitter Jessie Jaymes expressed support for the refusing pipefitters and was named as a witness for the complainants in preparation for the Department of Labor hearing. CP 759, 764-766. These seven pipefitters, including respondents

Brundridge, Hodgin, Jaymes and Richardson, were laid off effective March 10, 1998. CP 1014, 1023.

On April 6, 1998, these four newly laid off pipefitters filed a complaint with the DOL alleging that they had been unlawfully retaliated against under 42 U.S.C. § 5851 for engaging in the protected activity of supporting the refusing pipefitters. CP 1014-1027. In this matter, DOL issued its investigative finding, which held that Brundridge, Hodgin, Jaymes, and Richardson all engaged in protected whistleblowing activity under the Energy Reorganization Act for their various actions expressing vocal support of the refusing pipefitters. CP 1023-1024. The finding, however, credited Fluor's contention that the layoffs were not motivated by the protected activity, but were ordered because Fluor needed to make room for the reinstatement of the refusing pipefitters and that there was not enough work to support seven additional workers. CP 1025-1026.[1]

[1] The DOL investigation was limited in scope and failed to uncover critical evidence that was obtained in discovery in this litigation. For example, Ivan Sampson, one of petitioner's managers, testified at a deposition, under subpoena, that in early March 1998 he had overheard a telephone conversation between General Foreperson Nichols and Manager Holladay about pending layoffs. Corroborated by contemporaneous personal journal entries, Sampson testified that he heard Nichols tell Holladay on the phone that he felt he had a place for a couple of the fitters [meaning that there was no need to lay off seven]. CP 589-599, 903. Sampson testified that Holladay was so loud through the phone that he could hear him from across the room through the receiver yell, "I don't care, we're laying off seven for seven." CP 589-599, 903. Holladay then yelled, "Is Ivan there? You tell that son of a bitch that **I'll rip his balls off** if he tells anybody about this." CP 589-599, 903. Pursuant to Holladay's orders, seven pipefitters were laid off for the returning pipefitters.

Pipefitters Brundridge, Hodgin, Jaymes and Richardson appealed the DOL investigative finding and requested a hearing on the merits before an Administrative Law Judge. CP 1039.

The refusing pipefitters returned to the work site on or about March 10, 1998, pursuant to the settlement. CP 1041, 1045. They were split up and assigned to different crews. Rumors in the workplace indicated that management intended to lay off the returning pipefitters within six months of their return to work. CP 485. Pipefitters Walli, Killen, Nicacio, and Stull were laid off on October 2, 1998, and Pipefitter O'Leary was laid off on November 25, 1998; Fluor stated each of these layoffs resulted from "lack of work." CP 1043.

Pipefitters Walli, Killen, Nicacio, Stull, and O'Leary filed another complaint with the DOL, alleging that Petitioner Fluor again had retaliated against them in violation of the whistleblower protection provisions of the Energy Reorganization Act. CP 1031-1034.

In August 1999, Pipefitters Walli, Killen, Nicacio, Stull, O'Leary, Brundridge, Hodgin, Jaymes and Richardson elected to pursue claims for wrongful discharge in violation of public policy and civil conspiracy in Washington State Court, and dismissed their administrative claims, because of the limitations of the DOL forum and to prevent collateral estoppel from precluding their state court claims. CP 771-774.

Respondent David Faubion, a pipefitter at Hanford for over twenty-three years, joined the lawsuit because he was laid off ten days after being told by Fluor management not to talk with any of the pipefitters who were reinstated pursuant to the DOL settlement. CP 500-501. Faubion had

chosen to carpool with Randall Walli, who was one of the reinstated pipefitters. CP 500-501. Faubion's position was instantly filled by another worker. CP 501, 933, 957.

On August 18, 1999, petitioner filed a Notice of Removal of Civil Action to U.S. District Court. Petitioner argued that respondents' wrongful discharge and civil conspiracy claims were preempted by the Labor Management Relations Act, § 301, 1947 (LMRA), 61 Stat. 156, 29 U.S.C. § 185, because their employment was governed by a collective bargaining agreement. CP 1258-1261. Petitioner also claimed federal question jurisdiction on the grounds that strong federal and national security interests were implicated, because the events and the parties involved in the suit related to the Hanford facility. CP 1246-1247. Petitioner did not allege preemption under 29 U.S.C. §§ 157, 158.

Respondents filed a Motion for Remand to state court. Respondents argued that interpretation of the terms of the CBA was not required to resolve the independent state law claims of wrongful discharge and civil conspiracy and therefore that Section 301 did not preempt their claims. CP 1238; *also see Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 413 (1988). Respondents also argued that national security was not implicated by their claims. CP 1244-7.

The parties submitted documentary evidence for consideration by the court including: attorney and witness declarations, the Hanford Site Stabilization Agreement, Justification for Use of PL 85-804, the 6/9/97 Text of Presidential Memo, excerpts of the deposition transcripts of Henry Tonning, Roger Tool, Ivan Sampson, Jeff Stair, James Hanna, and Fred Rutt, the Pipefitter Settlement

Agreement, Defendant's responses to Plaintiffs' First Interrogatories, and the July 3, 1996 Management Excerpts. *See* Respondent's Motion for Judicial Notice filed in Court of Appeals.[2]

The CBA contains a grievance procedure, culminating in arbitration, for resolving disputes that "arise out of the interpretation or application of this AGREEMENT." CP 171, Resp. Appendix at 19a. The CBA further provides that:

> No such grievance shall be recognized unless called to the attention of the EMPLOYER by the UNION or to the attention of the UNION by the EMPLOYER in writing or postmarked with ten (10) working days after the alleged violation was committed. . . . Failure to process a grievance, or failure to respond in writing, within the time limits provided above . . . shall be deemed a waiver of such grievance. . . . "

CP 170.

The CBA also states that "no employee will be required to perform any work in an unsafe manner or unsafe condition" CP 170, Resp. Appendix at 18a and that:

> it will not be a violation of this AGREEMENT when the EMPLOYER considers it is necessary to shut down to avoid possible loss of human life because of an emergency situation that could endanger the life and safety of an employee. . . .

[2] The motion for judicial notice was granted by the Court of Appeals. Pet. App. at 4a n. 3.

> Employees shall not be *discharged* for refusing to work in the above-described situations.

CP 170 (Emphasis added).

On December 20, 1999, Judge Shea of the U.S. District Court for the Eastern District of Washington granted Respondents' Motion for Remand to the Superior Court of Washington for Benton County. CP 1248, Resp. Appendix at 13a.

Following *Lingle*, the court held that plaintiffs' state wrongful discharge claims were not preempted under section 301, because their adjudication did not require interpretation of the CBA. CP 1238-1248, Resp. Appendix at 3a-13a. The court found that reference in the complaint to the CBA was to show petitioner's failure to base plaintiffs' layoffs on the legitimate reasons articulated in the CBA – skill, productivity, and qualifications – and thereby to prove that defendant's motive in discharging plaintiffs was retaliatory. CP 1242-1243. The court explained that "[p]laintiffs rely on the factual history preceding their discharge as direct and circumstantial evidence that retaliation was the reason [for the layoffs]." CP 1243, Resp. Appendix at 7a-8a.

The court found that the petitioner's contention that federal jurisdiction was mandated by strong federal and national security interests was unsubstantiated, and that the argument turned on inapposite authorities concerning disputes between government contractors and subcontractors. CP 1242-1243.

In March, 2000 respondent Pipefitter Charles Cable testified under subpoena in a deposition that he had been told by petitioner's supervisors approximately six months

earlier that Daniel Phillips and Terry Holbrook, two of the refusing pipefitters, had been placed on the layoff list but could not be laid off until litigation was over. CP 247-255, 1104, 1109-1119. On May 2, 2000, Cable, a pipefitter at Hanford since August 1993, was laid off. CP 1116-1117. Cable then joined this lawsuit.

On August 10, 2000, one month prior to trial, defendant moved for summary judgment. CP 1539-1563. No federal issue was raised in the motion.

On September 20, 2000, Superior Court Judge Carolyn Brown granted defendant's motion for summary judgment as to plaintiffs' civil conspiracy claims, but denied the motion as to plaintiffs' claims for wrongful discharge in violation of public policy.[3] CP 1319.

On April 12, 2001, petitioner filed a Motion to Dismiss Or, In The Alternative, To Stay This Action based on the Federal Arbitration Act (FAA). CP 227-244. Petitioner did not allege preemption under 29 U.S.C. §§ 157, 158.

On May 3, 2001, Judge Brown granted defendant's Motion, finding that this Court's decision in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) dictated that plaintiffs' wrongful discharge claims proceed to arbitration under the FAA. RP 17. Upon request by plaintiffs, Judge Brown stayed the order to allow for appeal of her ruling. RP 18.

[3] The trial court's dismissal of plaintiffs' civil conspiracy claims was not a subject of the appeal.

On appeal to the Washington Court of Appeals, in its responsive brief, petitioner raised for the first time a preemption claim under 29 U.S.C. §§ 157, 158. On December 4, 2001, the Court of Appeals reversed the decision of the trial court, holding that respondents' claims are neither preempted by the NLRA nor are they subject to mandatory arbitration under the FAA.

Respondent petitioned for review in Washington's Supreme Court and the petition was denied on August 7, 2002. *Pet*. at 14a-15a. On August 13, 2002, a mandate issued returning the case to the Washington Superior Court for trial. Resp. Appendix at 1a-2a. Petitioner filed its petition for writ of certiorari on December 4, 2002.

Respondents also note the following additional misstatements and omissions in the Petition for Writ of Certiorari. Fluor Hanford, Inc., appears as a petitioner on the case caption, but it is not a party to this action. *Pet.* at 4. Fluor Hanford, Inc. was dismissed as a party at summary judgment. See *Pet.* Appendix at 4a, n. 4. Fluor Federal Services, Inc. (Fluor), formerly Fluor Daniel Northwest, Inc., was the sole employer of the respondents and is the subject of the wrongful discharge claims in issue in this case.

Citing the Opinion of the Washington Court of Appeals in this case, petitioner asserts that the CBA between petitioner and respondents' union "included (1) a guarantee that workers would not be *laid off* for refusing to work in unsafe conditions . . . App. 3a." *Pet.* at 4. (Emphasis added). The CBA contained no such guarantee and the Court of Appeals' opinion does not state the CBA does contain such a guarantee. The CBA, as noted above, prohibits "discharge" for such refusal. Petitioner has

represented its actions towards respondents as "layoffs." CP 659, 1299-1306.

Throughout this litigation, petitioner has denied the existence of unsafe conditions associated with the incidents preceding the "layoffs." CP 659, 1299-1306. Petitioner also has denied throughout this litigation that there was any connection between its layoffs of several of the respondents and their above-mentioned refusal to use an underrated valve. CP 659, 1299-1306.

Petitioner's assertion that it "implemented a series of reductions in force that eliminated the jobs of 81 pipefitters, including all eleven respondents" is false. *See Pet.* at 4. Petitioner Fluor disregarded its own criteria for selecting pipefitters for layoff – including work performance, length of service, dependability, certifications and training – in terminating respondents. Instead, respondents were selected for termination at the direction of Fluor management with the support of the general foreperson and forepersons. CP 573-580; Resp. Appendix at 17a.

REASONS FOR DENYING THE WRIT

I. WRONGFUL DISCHARGE CLAIMS FOR VIOLATION OF STATE HEALTH AND SAFETY LAWS FALL SQUARELY WITHIN THE "LOCAL INTERESTS" EXCEPTION TO *NLRA* PREEMPTION

Respondents have each asserted separate state law claims of wrongful discharge in violation of public policy. Each respondent must prove the following elements to prevail: (1) the existence of a clear public policy; (2) that discouraging the conduct in which they engaged would

jeopardize the public policy; (3) that the public-policy-linked conduct caused the dismissal; (4) the defendant must not be able to offer an overriding justification for the dismissal. *Roberts v. Dudley*, 140 Wn.2d 58, 64-65 (2000).

Respondents' claims turn variously on 1) having been discharged for reporting and then refusing to use an unsafe, underrated valve in a pressurized pipe, 2) having supported the above-mentioned refusing pipefitters by offering testimony, reporting the retaliation, speaking out in their support, car pooling with one of the refusing pipefitters or testifying honestly during depositions in connection with litigation on behalf of the refusing pipefitters. Respondents have cited Washington State health and safety laws and regulations that express public policy, whose implementation has been thwarted by their discharge. CP 254, 1242, 1245, 1317.

Petitioner now argues – having failed to raise this claim either in the state trial court, or in the federal district court below – that respondents' claims are preempted under the National Labor Relations Act, 29 U.S.C. §§ 151 et seq. (*Garmon). Pet.* at 9.

In *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244 (1959) this Court explained that the National Labor Relations Board generally has exclusive jurisdiction to resolve disputes involving unfair labor practices, except where state-regulated conduct touches "interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." Respondents' claims for wrongful discharge in violation of Washington Health and Safety laws fall within this exception. See *Inter-Modal Rail*

Employees Ass'n v. Burlington Northern and Santa Fe Ry. Co., 73 Cal. App. 4th 918, 924-928 (1999); *Paige v. Henry J. Kaiser Co.*, 826 F.2d 857, 862-865 (9th Cir 1987), cert. denied, 486 U.S. 1054 (1988).

As the California Court of Appeal has explained:

> 'Congress's main goal in enacting the NLRA was to establish an equitable bargaining process. . . . State laws which set minimum safety standards do not interfere with the bargaining process itself. . . . In *Metropolitan Life v. Mass [(1985) 471 U.S. 724 [105 S. Ct. 2830, 85 L. Ed. 2d 728]], the Supreme Court considered the legislative history of the NLRA and made the following statement: "Most significantly, there is no suggestion in the legislative history of the Act that Congress intended to disturb the myriad state laws then in existence that set minimum labor standards, but were unrelated in any way to the processes of bargaining or self-organization. To the contrary, we believe that Congress developed the framework for self-organization and collective bargaining of the NLRA within the larger body of state law promoting public health and safety. The States traditionally have had great latitude under their police power to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons [Citation.] States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State. Child labor laws, minimum and other wage laws, laws affecting occupational health and safety . . . are only a few examples. [Citation]"*
>
> . . . .

> As it is uniquely within the states' police powers to legislate for the health and safety of their citizens, and such regulation does not interfere with the NLRA's goals, federal law does not preempt such statutes.'

Inter-Modal, 73 Cal. App. 4th at 926-927 (citing *Paige*, 826 F.2d at 863-865) (emphasis in original).

Petitioner contends that the Eighth Circuit case of *Platt v. Jack Cooper Transport Co.*, 959 F.2d 91 (8th Cir. 1992) shows that *Garmon* is broader than has been recognized and that, in fact, the NLRA *does* preempt "claims of wrongful discharge in violation of state public policy by workers claiming to be whistleblowers on workplace-safety issues." *Pet*., p. 9. Petitioner urges that this Court adopt what it understands to be the *Platt* court's approach to *Garmon* and resolve a putative split on this issue between the Eighth Circuit and other jurisdictions.

Respondents submit that petitioner reads more into *Platt* than the Eighth Circuit asserts in that case, and that the construction given to *Garmon* by the Eighth Circuit does not differ significantly from that arrived at by other courts. Indeed, rather than articulating new doctrine, *Platt* was an expressly fact specific decision:

> [O]n the facts of this case, we conclude that Platt's state law claims are preempted by the NLRA as construed in Garmon and its progeny. We do not reach the question whether employee suits seeking redress for violation of state whistle-blower statutes are generally preempted under Garmon because we believe the 'local interest' exception to Garmon preemption requires a more fact-sensitive approach.

Platt, 959 F.2d at 95; see *Inter-Modal*, 73 Cal. App. 4th at 927 (*Platt's* " holding was limited to its facts").

The facts on which the *Platt* court focused were that the plaintiff had invoked both the grievance procedure provided by the collective bargaining agreement and the authority of National Labor Relations Board prior to bringing his action in state court. See *Platt*, 959 F.2d at 95 n. 7 ("*Paige v. Henry Kaiser Co.*, 826 F.2d 857, 862 (9th Cir. 1987), cert. denied, 486 U.S. 1054 (1988), upon which Platt relied, is distinguishable for this reason").

> [It] is highly relevant that Platt unsuccessfully sought relief through the grievance process, and directly from the NLRB, before commencing this lawsuit. 'The risk of interference with the Board's jurisdiction is . . . obvious and substantial' when an unsuccessful charge to the Board is recast as a state law claim. *Local 926, IUOE v. Jones*, 460 U.S. 669, 683 (1983). As the Eleventh Circuit said in *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1517 (11th Cir. 1988), cert. denied, 490 U.S. 1066 (1989):
>
> 'We believe that the [Garmon preemption] rationale has the greatest validity when a party has sought redress for his claims from the NLRB and in the face of an adverse decision the claims are restructured as state law claims and pursued in state court.'

Platt, 959 F.2d at 95. Respondents in this case, in contrast, neither grieved the claims underlying this action nor did they present them to the NLRB.

In addition, it is noteworthy, as the California Court of Appeal observed in *Inter-Modal*, that the plaintiff in *Platt* did not even assert that his claim fell within the local

interests exception to *Garmon* preemption. *Inter-Modal*, 73 Cal. App. 4th at 928; see *Platt*, 959 F.2d at 95. The resulting "thin" analysis in *Platt* of the question of whether state health and safety claims fall within *Garmon's* local interests exception was one of the reasons the *Inter-Modal* court cited for declining to follow *Platt*. *See Inter-Modal*, 73 Cal. App. 4th at 928.

Petitioner, in short, has adduced no authority for its broad claim that state whistleblower actions are preempted under *Garmon*. The case on which petitioner relies is manifestly inapposite to the facts of this case, and indeed, is unusually ill-suited to serve as the basis for development of the law on this question.

Finally, respondents note that petitioner, a contractor at the Hanford nuclear facility, asserts that its employees at Hanford are not protected by Washington's health and safety laws. *Pet.* at 13. Petitioner has adduced no authority showing that persons employed by contractors at Hanford lack these protections, and respondents are aware of none. *See* Resp. Appendix at 11a-12a.

II. THE RIGHT TO LITIGATE VIOLATIONS OF INDIVIDUAL RIGHTS IN COURT MAY NOT BE WAIVED THROUGH A CBA, WHICH DOES NOT INCLUDE A CLEAR AND UNMISTAKABLE WAIVER OF THAT RIGHT

Citing this Court's decision in *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70, 79-80 (1998), the Court of Appeals held that respondents were not obligated under the Federal Arbitration Act (FAA) to arbitrate their wrongful discharge claims, because the CBA did not clearly and

unmistakably waive their individual rights to litigate such claims in court. *Pet.,* Appendix 6a-8a.

Petitioner argues that the Court of Appeals erred, because "*Wright* held only that the presumption in favor of arbitration under the Labor Management Relations Act of 1947 (LMRA), 29 U.S.C. § 185 does not apply to workers' federal statutory claims . . . " *Pet.* at 15. *Wright* is not so narrow. *Wright* articulates, and indeed reaffirms, a general condition for the waiver of individual rights through collective bargaining agreements:

> Not only is petitioner's statutory claim not subject to a presumption of arbitrability; we think any CBA requirement to arbitrate it must be particularly clear. . . . '*We will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is "explicitly stated." More succinctly, the waiver must be clear and unmistakable.*'

Wright, 525 U.S. at 79-80 (citing *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983)) (emphasis added).

The case whose language *Wright* quotes for this proposition, *Metropolitan Edison Co. v. NLRB*, does not even address the presumption of arbitrability. *Metropolitan*, rather, concerned the conditions under which a CBA may waive the statutory rights of certain individuals, specifically the rights of union officials under the National Labor Relations Act to not be subject to harsher sanctions than other employees. *Metropolitan*, 460 U.S. at 695, 697-698.

In *Metropolitan*, the union had filed an unfair labor practice charge based on the employer's discriminatory

punishment of union officials and the employer defended, *inter alia*, by arguing that the union had waived the officials' statutory right to not be subjected to differential punishment. *Id*. at 705, 707-708. *Metropolitan* held there was no waiver of the right, because the putative basis of the waiver – acquiescence in the face of prior arbitration decisions under the CBA affirming such punishment – did not constitute a clear and unmistakable waiver of the right. *Id.* at 708-710.

Thus, both this Court's express language in *Wright*, and the case from which it borrowed that language clearly demonstrate that *Wright* articulates a general standard for the waiver of individual rights through a collective bargaining agreement, and not simply a qualification of the LMRA's presumption of arbitrability. The Court of Appeals' reliance on *Wright* in this case, therefore, was manifestly appropriate, regardless of the applicability of the FAA. *See Rogers v. New York Univ.*, 220 F.3d 73, 75-77 (2nd Cir. 2000), cert. denied, 531 U.S. 1036 (2000) (holding FAA did not compel arbitration of individual discrimination claim, because the CBA failed to satisfy *Wright* standard for waiver of individual rights). Moreover, the Court of Appeals' finding that the CBA in this case failed to satisfy the *Wright* standard is unassailable.

The CBA here is limited to disputes that "arise out of the interpretation or application of this AGREEMENT." CP 171, Resp. Appendix at 19a. At no point does the CBA include any "explicit incorporation of statutory" protections. *See Wright*, 525 U.S. at 80. Thus, even less than the CBA in issue in *Wright*, which provided "for arbitration of 'matters under dispute,'" does the CBA in this case clearly and unmistakably waive respondents' rights to litigate in

court their claims for violation of state laws. *See id*. at 80-81; *see also Lingle*, 486 U.S. at 411-413.

In short, there is no reason to doubt that *Wright* articulates the condition under which the right to litigate in court claims concerning rights based in law independent of a CBA may be waived through a CBA. Since the language in this CBA is manifestly insufficient to effect such waiver, this case offers an extremely poor vehicle for resolution of the question petitioner would have this Court address: "whether, and under what circumstances, an arbitration clause in a CBA can be deemed to waive an employee's right to a judicial forum for individual employment related claims." *Pet.* at 15.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

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FLUOR FEDERAL SERVICES INC. (formerly FLUOR DANIEL NORTHWEST, INC.) a Washington Corporation, FLUOR HANFORD, INC., (formerly, FLUOR DANIEL HANFORD, INC.), a Washington Corporation,

Respondents.

JERRY NICHOLS, an individual and his marital community, DAVID FOUCAULT, an individual and his marital community, AND JIM HOLLADAY, an individual and his marital community,

Defendants.

MANDATE

No. 20157-1-III

Benton County
No. 99-2-01250-7

The State of Washington to: The Superior Court of the State of Washington, in and for **Benton** County

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division III, filed on **December 4, 2001** became the decision terminating review of this court in the above-entitled case on **August 7, 2002**. The cause is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

In testimony whereof, I have hereunto
set my hand and affixed the seal
of said Court at Spokane, this
13th day of August, 2002.

/s/ Patricia P. Crandall
Clerk of the Court of Appeals, State of Washington
Division III

cc: John P. Sheridan
Dana L. Gold
William R. Squires
Lawrence C. Locker
Hon. Carolyn A. Brown

(SEAL)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

SCOTT BRUNDRIDGE, DONALD HODGIN, JESSIE JAYMES, CLYDE KILLEN, PEDRO NICACIO, SHANE O'LEARY, RAYMOND RICHARDSON, JAMES STULL, RANDALL WALLI, and DAVID FAUBION,

Plaintiffs,

v.

FLUOR DANIEL, INC., a California corporation; FLUOR DANIEL HANFORD, INC., a Washington corporation; FLUOR DANIEL NORTHWEST, INC., a Washington corporation; JERRY NICHOLS, an individual and his marital community; DAVID FOUCAULT, an individual and his marital community; and JIM HOLLADAY, an individual and his marital community.

Defendants.

NO. CT-99-5073-EFS

ORDER GRANTING PLAINTIFFS' MOTION TO REMAND TO STATE COURT

BEFORE THE COURT is Plaintiffs' Motion to Remand to State Court (Ct. Rec. 10). The Court heard oral argument on the motion on October 14, 1999. John P. Sheridan and Dana L. Gold represented Plaintiffs. William R. Squires III and Elizabeth R. Kennar represented

Defendants. Charlie MacLeod also participated for Defendants. The Court has reviewed the briefing and record, has considered the arguments, and is fully informed. For the reasons stated below, Plaintiffs' motion to remand is granted.

I. BACKGROUND.

In August 1999, Plaintiffs filed their Complaint and Amended Complaint in Superior Court of the State of Washington for Benton County against Defendants. (Ct. Rec. 6.) The Amended Complaint set forth the state law causes of action of wrongful discharge in violation of public policy and of civil conspiracy. (First Am. Compl. for Damages and Demand for Jury Trial, Ct. Rec. 6, ¶ 3.2.)

Plaintiffs were union pipefitters who worked at the United States Department of Energy ("DOE") Hanford nuclear weapons facility as employees of Defendant Fluor Daniel Northwest, Inc. ("FDNW"). Defendants FDNW and Defendant Fluor Daniel Hanford, Inc. ("FDH"), which created FDNW as an enterprise company, are wholly owned subsidiaries of Defendant Fluor Daniel, Inc. ("FD"). DFH is the primary DOE contractor responsible for "much of the cleanup project at the Hanford facility." (Decl. of James H. Hanna in Supp. of Defs.' Opp'n to Mot. for Remand, Ct. Rec. 19, ¶ 2.)

Plaintiffs allege that, in March 1997, FDNW management directed five of the Plaintiffs ("Plaintiffs I") to install a valve in a line that would carry high-level nuclear waste. The valve was under-rated for the pressure that would flow through the pipe; Plaintiffs I refused to install it for safety reasons. They were terminated in June 1997. The remaining Plaintiffs ("Plaintiffs II") vocally supported

Plaintiffs I. Plaintiffs I filed administrative claims with the Department of Labor under the Energy Reorganization Act "ERA"). Prior to the administrative hearing, Plaintiffs I entered a settlement agreement with FDNW that required immediate reinstatement of Plaintiffs I. In March 1998, Plaintiffs II and several others were terminated, allegedly because FDNW was unable to absorb the reinstatement of Plaintiffs I. Plaintiffs I were laid off again in October and November 1998.

Defendants filed a Notice of Removal of Civil Action to United States District Court (Ct. Rec. 1) and Amended Notice of Removal of Civil Action of United States District Court (Ct. Rec. 5) in August 1999, asserting that removal was proper under 28 U.S.C. § 1441 because the District Court has original "federal question" subject matter jurisdiction under 28 U.S.C. § 1331.

In September 1999, Plaintiffs filed their motion to remand asserting that removal of the case to federal court was improper because the District Court lacked subject matter jurisdiction.

II. STANDARD FOR REMOVAL

A defendant may remove to federal court only those state court actions which could have been originally filed in federal court. *See* 28 U.S.C. § 1441(a); *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987). A claim could have been filed in federal court if it arises under the laws of the United States, i.e., if there is "federal question" subject matter jurisdiction. *See* 28 U.S.C. § 1331. "Federal jurisdiction must be rejected if there is any doubt as to the right of removal in the first instance." *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992). If any one of Plaintiffs'

claims comes within the jurisdiction of the federal court, removal is proper as to the whole case. *See* 28 U.S.C. § 1441(c). The party seeking removal has the burden of establishing federal jurisdiction. *See Emrich v. Touche Ross & Co*., 846 F.2d 1190, 1995 (9th Cir. 1988).

III. DISCUSSION

Defendants assert the Court has original "federal question" subject matter jurisdiction because 1) Plaintiffs claims are preempted by Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, since Plaintiffs' employment with FDNW is governed by a collective bargaining agreement ("CBA") and since Plaintiffs' claims require interpretation of that agreement; 2) Plaintiffs seek recovery for the alleged violation of the federal policies promoting worker safety and protecting workers reporting health and safety violations; and 3) strong federal and national security interests are necessarily implicated by the involvement of the Hanford facility and reconstruction project.

A. Federal Question Jurisdiction and Preemption of Section 301 of the LMRA

If Plaintiffs' claims require interpretation of the CBA, they will be preempted by Section 301 of the LMRA and therefore will arise under the laws of the United States and provide federal question jurisdiction. *See Caterpillar*, 482 U.S. at 393 (holding that the preemptive force of the federal law "converts an ordinary state common-law complaint into one stating a federal claim"). "Section 301 governs claims founded directly on rights created by collective-bargaining agreements." *Id.* at 394. "[I]f the

resolution of a state-law claim depends upon the meaning of a collective-bargaining agreement, the application of state law . . . is preempted and federal labor-law principles . . . must be employed to resolve the dispute." *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 405-406 (1988). However, "as long as the state-law claim can be resolved without interpreting the agreement itself, the claim is 'independent' of the agreement for § 301 preemption purposes." *Id*. at 410.

1. Wrongful Discharge

Plaintiffs base their wrongful discharge claim on the allegation that they were discharged in March, October, and November of 1998 in retaliation for refusing to engage in unsafe practices or in retaliation for vocally supporting those who were fired after reporting safety problems. (Mem. of P. & A. in Supp. of Mot. for Remand to State Ct., Ct. Rec. 12, at 1-2.) Under Washington state law a successful claim of wrongful discharge in violation of public policy requires showing that 1) a clear public policy exists; 2) discouraging the employee's conduct would jeopardize the policy; 3) the public-policy related conduct causes the dismissal; and 4) there was no overriding justification for the dismissal. *See Gardner v. Loomis Armored Inc.*, 128 Wash. 2d 931, 941 (1996). Defendants argue that proving the third and fourth elements of the tort of wrongful discharge in violation of public policy will require interpreting the CBA. (Ct. Rec. 5 ¶ 4; Defs.' Opp'n to Pls.' Mot. for Remand, Ct. Rec. 20 ¶ B.2. at 9)

Interpretation of the CBA is not required to determine the propriety of Plaintiffs' termination or Plaintiffs' entitlement to recovery. Plaintiffs rely on the factual history

preceding their discharge as direct and circumstantial evidence that retaliation was the reason. The CBA permits layoffs based on skill, productivity and qualifications. Plaintiffs assert that examination of their credentials eliminates any question that they could have been laid off for those reasons. Such an argument does not require an interpretation of the CBA but rather the facts preceding and surrounding their layoffs.

2. Civil Conspiracy

Plaintiffs base their civil conspiracy claim on the allegation that Defendants' conduct in laying them off in March, October and November 1998 amounted to civil conspiracy. (Ct. Rec. 12 at 2.) To succeed in their claim, Plaintiffs must prove by clear, cogent and convincing evidence that 1) "two or more persons combined to accomplish an unlawful purpose or combined to accomplish some purpose not in itself unlawful by unlawful means" and 2) "the alleged coconspirators entered into an Agreement to accomplish the object of the conspiracy." *Corbit v. J.I. Case Co.*, 70 Wash. 2d 522, 528-29 (1967). Defendants assert that the CBA must be interpreted to determine if Defendants' acts were "unlawful means" or accomplished an "unlawful purpose."

The facts Plaintiffs allege to support their civil conspiracy claim are 1) that Defendant FDNW Construction Director Foucault and Defendant FDH General Counsel MacLeod deliberately misrepresented the terms of the settlement agreement as requiring the lay off the same number of pipefitters as were being reinstated under the settlement agreement; this misrepresentation resulted in the layoff of Plaintiffs II; 2) that Defendants insisted in

laying off the same number of pipefitters as were reinstated despite the discovery of two jobs which would prevent laying off all seven pipefitters; 3) that Defendant FDNW Construction Operations Manager Holladay discouraged managers from finding places for the returning Plaintiffs. (Ct. Rec. 6 ¶ 2.12.)

Even though analysis of the claim may involve identifying the terms of the settlement agreement or of the CBA, or both, no interpretation of the agreement or the CBA is required. As discussed above, Plaintiffs rely on the facts surrounding the discharges as evidence that Defendants were conspiring to lay them off, not on the interpretation of either the agreement of the CBA.

3. Conclusion

Neither Plaintiffs' wrongful discharge claim nor Plaintiffs' conspiracy claim requires interpretation of the CBA. The claims are therefore not preempted by Section 301 of the LMRA and do not provide federal question jurisdiction on the basis of Section 301 preemption.

B. Federal Question Jurisdiction and Reliance on Federal Policies

Plaintiffs assert that their discharges violated "state and federal public policies of promoting worker safety, protecting the environment from radioactive material and hazardous waste, promoting the safe storage and disposal of radioactive and hazardous materials promoting clean water, and protecting those who report health and safety violations." (Ct. Rec. 6 ¶ 3.2.) Defendants assert that Plaintiffs' claims arise under federal law and provide federal subject matter jurisdiction because Plaintiffs 1)

assert their discharges violated federal public policies and 2) reference 42 U.S.C. § 5851, the whistleblower provision of the ERA, in the recitation of facts portion of their complaint (Ct. Rec. 6 ¶¶ 2.3, 2.4).

On its face, Plaintiffs' Complaint asserts no federal law claim. Plaintiffs' claims of wrongful discharge in violation of public policy and civil conspiracy are state law claims. *See*, *e.g.*, *Gardner*, 128 Wash. 2d at 941 (setting forth the elements for public policy wrongful discharge torts; *Thompson v. St. Regis Paper Co.*, 102 Wash. 2d 219, 232 (1984) (recognizing "a cause of action in tort for wrongful discharge if the discharge of the employee contravenes a clear mandate of public policy). Plaintiffs explicitly state that "no recovery based on a federal claim is sought." (Mem. of P. & A. in Supp. of Mot. for Remand to State Ct., Ct. Rec. 12 ¶ III at 7.) Mere reference to a federal law or statute in the complaint does not create a federal claim. *See Rains v. Criterion Sys., Inc.*, 80 F.3d 339, 344 (9th Cir. 1996). Furthermore, Plaintiffs' reference to 42 U.S.C. § 5851, specifically, does not create a federal claim as a result of preemption. Section 5851 states that it

> may not be construed to expand, diminish, or otherwise affect any right otherwise available to an employee under Federal or State law to redress the employee's discharge or other discriminatory action taken by the employer against the employee.

42 U.S.C.A. § 5851(h) (West 1995).

That the Plaintiffs rest their wrongful discharge claim in part on federal public policies also does not create a federal claim. "When a claim can be supported by alternative and independent theories – one of which is a state law

theory and one of which is a federal law theory – federal question jurisdiction does not attach because federal law is not a necessary element of the claim." *Rains*, 80 F.3d at 346. In *Rains*, the court observed that the plaintiff's claim "that he was wrongfully terminated in violation of public policy" was "supported by three alternative theories – one for each of the three sources of law he cites to establish that his termination was in violation of public policy." *Id*. at 347. Because one of the sources of law plaintiff cited was "unquestionably wholly independent of federal law," the court found there was no federal jurisdiction. *Id*. Here, Defendants do not deny that Washington state laws prohibit the discharge of an employee for reporting safety violations.

Because Plaintiffs' Complaint does not assert a federal law claim and because Plaintiffs' claims do not rest solely on federal claims do not rest solely on federal public policies, federal question jurisdiction does not attach on the basis that Plaintiffs included federal public policy as a theory for the wrongful discharge claim.

C. Federal Question Jurisdiction Stemming from Strong Federal and National Security Interests

Defendants assert the existence of federal question jurisdiction because strong federal and national security interests are necessarily implicated because the events and parties involved in the complaint relate to the Hanford facility. Federal question jurisdiction exists where a suit concerns "matters affecting the operation of the federal government, where the rule must be uniform throughout the country." *American Pipe & Steel Corp. v. Firestone Tire & Rubber Co.*, 292 F.2d 640, 643-44 (9th Cir.

1961). In *American Pipe*, the court held that "the construction of subcontracts, let under prime contracts connected with the national security, should be regulated by a uniform federal law." 292 F.2d at 644. Similarly, in *New SD, Inc. v. Rockwell International Corporation*, 79 F.3d 953 (9th Cir. 1996), the court held that federal law governed a suit between a subcontractor and a prime contractor to the United States Air Force regarding a prime contract for development of military hardware. Noting that national security was implicated, the court relied in part on *American Pipe* and held that

> [w]here the federal interest requires that "the rule must be uniform throughout the country," . . . then the "entire body of state law applicable to the area conflicts and is replaced by federal rules." . . . When federal law applies . . . it follows that the question arises under federal law, and federal question jurisdiction exists.

Rockwell, 79 F.3d at 955 (citations omitted).

Here, however, the suit does not involve a dispute between prime- and sub-contractors regarding a contracted for good or services. Rather, the suit concerns a dispute between an employer and its employees. Although the context of this dispute is arguably similar to those in *American Pipe* and *Rockwell* since Plaintiff employees worked on an environmental clean-up project at a federal nuclear facility, caselaw does not clearly extend the "strong federal and national security interest" federal question jurisdiction to suits involving a government contractor's labor disputes. This Court declines to take so large a step and finds there is no "national security interest" federal question jurisdiction.

IV. CONCLUSION

Since Defendants have failed to prove federal jurisdiction exists on any of the three bases they assert, removal of this case to federal district court is improper for lack of subject matter jurisdiction. Accordingly,

IT IS HEREBY ORDERED:

1. Plaintiffs' Motion for Remand to State Court (Ct. Rec. 10) is GRANTED.

2. This case is hereby REMANDED to Benton County Superior Court.

IT IS SO ORDERED. The District Court Executive is directed to enter this order, provide copies to counsel, prepare and enter JUDGMENT accordingly, and CLOSE THIS FILE.

DATED this day of 20th December 1999.

/s/ Edward F. Shea
EDWARD F. SHEA
United States District Judge

EXHIBIT 34

FLUOR DANIEL

Fluor Daniel Hanford, Inc.
P.O. Box 1000
Richland, WA 99352

Settlement Agreement Between Employers
Fluor Daniel Northwest, Inc. and
Terry Holbrook, Clyde Killen, Pete Nicacio,
Shane O'Leary, Dan Phillips,
James D. Stull, Randall J. Walli
DOL Case No. 98-ERA-4

Fluor Daniel Northwest, Inc. (FDNW) and the above named seven Complainants agree to the following:

1. FDNW agrees to pay each of the Complainants $42,000.

2. This $42,000 per Complainant is not a "make whole" amount or based on any wage formula, rather it is for case settlement.

3. FDNW agrees to offer reinstatement of employment to each of the Complainants within two weeks of the signing of this Settlement Agreement.

4. FDNW agrees to pay Complainants' attorneys, the Government Accountability Project and Project on Liberty and the Workplace, a total of $40,000 in legal expenses.

5. FDNW and Complainants agree to work for U.S. Department of Labor (DOL) approval of this Settlement Agreement and FDNW will pay the designated amounts within two weeks of final DOL approval.

6. FDNW admits no wrongdoing of any kind by signing this Settlement Agreement.

7. Complainants agree DOL Case No. 98-ERA-4 is settled by the signing of this Settlement Agreement.

8. Complainants agree that all disputes arising out of their employment with FDNW are settled by this Agreement as the purpose of this agreement is to dispose of all disputes between Complainants and FDNW. This Agreement constitutes a full and complete release of all claims made or which could have been made, against FDNW, its officers, employees, or representatives with respect to the subject matter of DOL Case No. 98-ERA-4.

9. FDNW and Complainants agree that this Settlement Agreement is to be interpreted by federal law governing these DOL proceedings and as appropriate with the laws of the State of Washington.

Signed by FDNW and Complainants this 23rd day of February, 1998.

Complainants:

/s/ Terry Holbrook
Terry Holbrook

/s/ Clyde Killen
Clyde Killen

/s/ Pete Nicacio
Pete Nicacio

/s/ Shane O'Leary
Shane O'Leary

For the Employer:

/s/ Joe D. Davis
Joe D. Davis, President
Fluor Daniel Northwest, Inc.

/s/ Dan L. Phillips
Dan Phillips

/s/ James D. Stull
James D. Stull

/s/ Randall J. Walli
Randall J. Walli

FOLDOUT CUSTOMER COPY P. 16

SAFETY AND HEALTH

Section 1. The EMPLOYER acknowledges its responsibility to comply with all applicable laws, ordinances, and regulations relating to safety and health. No employee will be required to perform any work in an unsafe manner or unsafe condition.

Section 2. The employees covered by the terms of this AGREEMENT shall at all times be bound by the safety rules and regulations as established by the EMPLOYER in accordance with the Department of Energy safety rules and regulations. Any employee's failure to comply with the safety requirements heretofore referred to or failure to participate and cooperate in such program shall be cause for discharge.

Section 3. The UNIONS agree that all employees will be required to use all required safety equipment and all required protective clothing supplied by the EMPLOYER. Failure or refusal to use such protective equipment is cause for discharge.

Section 4. It will not be a violation of this AGREEMENT when the EMPLOYER considers it is necessary to shut down to avoid the possible loss of human life because of an emergency situation that could endanger the life and safety of an employee. In such cases, employees will be compensated only for the actual time worked. In the case of a situation described above whereby the EMPLOYER requests employees to standby, the employees will be compensated for the "standby" time. Employees shall not be discharged for refusing to work in the above-described situations.

ARTICLE XXIV

GRIEVANCE PROCEDURE

Section 1. It is specifically agreed that in the event any disputes arise out of the interpretation or application of this AGREEMENT, excluding questions of jurisdiction of work, which shall be adjusted pursuant to Article XXIII, Jurisdictional Disputes, said disputes shall be settled in accordance with the procedures set out herein. No such grievance shall be recognized unless called to the attention of the EMPLOYEE by the UNION or to the attention of the UNION by the EMPLOYER in writing or postmarked within ten (10) working days after the alleged violation was committed.

Employees must notify their UNION within three (3) working days of the alleged violations

Section 2. Grievances shall be settled according to the following procedure.

> *Step 1*: The written disputes shall be referred to the representative of the UNION involved or his designated representative and the EMPLOYER'S designated representative.
>
> *Step 2*: In the event that the representative of the UNION and the EMPLOYER'S designated representative cannot reach agreement within five (5) working days after a meeting is arranged and held, the matter shall be referred to the representative of the International Union and the designated representative of the EMPLOYER.
>
> *Step 3*: In the event that the representative of the International Union and the EMPLOYER'S representative are unable to resolve the dispute within ten (10) calendar days after completion of

Step 2, it shall be adjusted by arbitration in the manner hereinafter set forth.

The EMPLOYER or his designated representative and the UNION shall then select an arbitrator for final and binding arbitration. The impartial arbitrator shall be selected from a panel of arbitrators submitted by the Federal Mediation and Conciliation Service in accordance with their procedures. The written decision of the Arbitrator shall be binding upon all parties. The arbitrator shall have no authority to change, amend, add to, or detract from any of the provisions of this AGREEMENT. The expense of the impartial arbitrator shall be borne-equally by the EMPLOYER and the UNION.

Step 4: The time limits specified in any step of the grievance procedure may be extended by mutual agreement of the parties initiated by the written request of one party to the other, at the appropriate step of the grievance procedure. However, failure to process a grievance, or failure to respond in writing, within the time limits provided above, without a request for an extension of time, shall be deemed a waiver of such grievance to the other without prejudice or without precedent to the processing of and/or resolution of like or similar grievances or disputes.

EXHIBIT 13

[LOGO]

FLUOR DANIEL NORTHWEST
INTEROFFICE CORRESPONDENCE

CONFIDENTIAL

To: David Foucault
Location: Richland, E668

From: Curt Larsen
Location: Richland, H7-04

Telephone: (509) 376-3367

Date: June 18, 1997
Reference: CGL-97-146

Client
Subject Selection of craft employee's for a layoff

cc: V.C. Hodgin

Per Jim Holladays's request I conducted an internal investigation on June 17, 1997 to see if Fluor Daniel Northwest (FDNW) has a selection process that management follows when selecting craft employees to be laid off.

I spoke with Area Managers, Superintendents, General Foreman and Foreman from the 300, 200E, 200W and 100 Areas. The selection process is as follows:

1. Area Managers and Superintendent work closely together in projecting the work forecast on a weekly basis. As projects slow down or funding is cut the Area Managers and/or the Superintendents contact the General Foreman (GF) or Foreman of the affected craft and inform them of the number of employees needed to be cut.

2. The GF and/or the Foreman select the craft employees by name to be laid off after discussions with other area GF/Foreman for possible placement. The selection process (not particularly in this order) is as follows; work performance, length of service, dependability, certifications and training. Once the

names have been selected the GF and/or the Foremen ask their crew if anyone would like to volunteer to be laid off. If no one steps forward then the names are submitted to the Area Manager. If someone volunteers to be laid off their name is added and someone is deleted from the original list.

3. The Area Manager(s) and Superintendent(s) review the list among themselves checking for positions available within different job area.

During this investigation it was brought to my attention by several employees, bargaining and non bargaining that Jim Holladay side steps the selection process. Mr. Holladay has called Human Resources with names of craft employees to be laid off without going through the GF/Foreman. Furthermore, Mr. Holladay has pulled individuals off the layoff list without notifying the GF/Foreman.

In summary, FDNW has a selection process that is used when downsizing craft employee: