Case Number S204221

IN THE SUPREME COURT OF CALIFORNIA

PARATRANSIT, INC.
Respondent,

V.

UNEMPLOYMENT INSURANCE APPEALS BOARD
Respondent,

CRAIG MEDEIROS
Petitioner, Real Party in Interest and Appellant.

[PROPOSED] REPLY IN SUPPORT OF APPELLANT'S REQUEST FOR JUDICIAL NOTICE

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REPLY IN SUPPORT OF APPELLANT'S REQUEST FOR JUDICIAL NOTICE

Real Party in Interest and Appellant Craig Medeiros requests judicial notice of seven federal labor arbitrator decisions which he cited as legal authority supporting arguments in his reply brief. Despite arguing for the first time in its brief to this Court that federal labor law principles are relevant to interpretation of the collective bargaining agreement in this case, Paratransit opposes judicial notice of this federal labor law authority. Paratransit is wrong. This Court can and should take judicial notice of the labor arbitrator decisions as relevant legal authority.

I. OPPOSITION TO THE REQUEST FOR JUDICIAL NOTICE WAS FILED LATE.

California Rule of Court 8.54(a)(3) requires opposition to any motion be filed within 15 days after the motion is filed. A request for judicial notice is a motion. (Cal. Rule Court 8.252(a)(1).) Medeiros' Request for Judicial Notice was filed on May 20, 2013. Paratransit had until June 10, 2013 to file its opposition (15 days plus five days for mail service). Paratransit filed its opposition on June 13, 2013, which was three days late. Therefore, Paratransit's opposition should be disregarded.

II. FEDERAL LABOR ARBITRATOR DECISIONS ARE SUBJECT TO JUDICIAL NOTICE UNDER EVIDENCE CODE SECTION 452.

This Court has the same power as trial courts to take judicial notice. (Evid. Code § 459.) Evidence Code Section 452(c) authorizes judicial

notice of "Official acts of the legislative, executive and judicial departments of the United States . . . ."

The Federal Mediation and Conciliation Service (FMCS) is an agency within the United States Department of Labor that provides arbitration services for "final adjustment of grievances or questions regarding the application or interpretation of" collective bargaining agreements. (29 U.S.C. § 171(c); 29 U.S.C. § 173(d) and (f).) As evidenced by their FMCS case numbers, Exhibits 2, 4, 5, and 7 of Appellant's Motion for Judicial Notice in Support of Reply Brief are FMCS cases wherein the arbitrator was appointed by and pursuant to FMCS' procedures. FMCS arbitrators "must demonstrate experience, competence, and acceptability in decision-making roles in the resolution of disputes arising from collective bargaining agreements," be reviewed by a special FMCS Review Board to assure they meet the qualification standards, and be appointed by the Director. (http://www.fmcs.gov/internet/itemDetail.asp?categoryID=184&itemID=16436.) FMCS labor arbitrator decisions are, therefore, official acts of an executive agency of the United States and judicially noticeable under Evidence Code Section 452(c).

Additionally, the contents of the labor arbitrator decisions are facts not reasonably subject to dispute and, therefore, also judicially noticeable

under Evidence Code § 452(h) regardless of FMCS involvement.[1] Labor arbitrator decisions, when used as legal authority as requested here, are the equivalent of judicial decisions. (*See e.g. Consolidated Coal Co. v. United Mine Workers of America District 12 Local Union 1545* (7th Cir. 2000) 213 F.3d 404, 407; *Smith v. U.S. Postal Service* (Fed. Cir. 2002) 45 Fed. Appx. 928, *3.)

In fact, the treatise Paratransit relies on in its brief cites labor arbitrator decisions as its authority. (Elkouri & Elkouri, How Arbitration Works (7th Ed. 2010) at p.16-31.) Paratransit does not contest the authenticity of the arbitrator decisions. Judicial notice of arbitration decisions, which constitute legal authority on point, is appropriate under Evidence Code Section 452(h).

III. BROSTERHAUS V. STATE BAR IS INAPPOSITE

Brosterhaus v. State Bar (1995) 12 Cal.4th 315 does not support Paratransit's claim that arbitration decisions are not subject to judicial notice. The Court expressly did not address the issue. "We need not decide the propriety of judicial notice of a State Bar arbitration, however." (*Id.* at

[1] Exhibits 3, 6, and 9 to Appellant's Motion for Judicial Notice in Support of Reply Brief are not FMCS arbitration decisions. As a result, Appellant acknowledges that judicial notice of these three decisions should have been requested under Evidence Code section 452(h) rather than 452(c). Appellant, therefore, requests that the Court consider the request for notice of these decisions under section 452(h) and that the Court consider the request for notice of Exhibits 2, 4, 5, and 7 (i.e. the FMCS decisions) under both section 452(c) and 452(h).

p.325.) *Brosterhaus* is not authority for an issue the Court did not decide. (*Kinsman v. Unical Corp.* (2005) 37 Cal.4th 659, 680.)

Brosterhaus did hold that arbitration that is not part of a judicial proceeding is not a *court record* subject to judicial notice under Evidence Code Section 452(d). (*Id.* at p.325.) That does not make them any less judicially noticeable as acts of an agency of the United States under subdivision (c) and indisputable facts under subdivision (h). Nothing in *Brosterhaus* suggests that judicial notice was requested under either of these sections.

Moreover, the judicial notice request in *Brosterhaus* was for the *record* of arbitration proceedings to support a claim of res judicata, not a request for judicial notice arbitration *decisions*. (*Id.* at p.324.) Here, the request is only for arbitration decisions, and the purpose is legal authority, not evidence or the truth of any matters. *Brosterhaus* says nothing about judicial notice of arbitration decisions as legal authority.

Furthermore *Brosterhaus* rejected the judicial notice request because, without explanation, the request was not presented to the trial court. (*Id.* at pp. 325-26.) Here, the labor arbitration decisions were not relevant until Paratransit raised federal preemption under federal labor law for the first time in its brief on the merits in this Court. Medeiros had no occasion to request judicial notice of the arbitration decisions prior to filing his reply brief. They had no relevance to the case before then. *Brosterhaus*

also questioned whether State Bar arbitrations are official actions of the judicial department judicially noticeable under Evidence Code Section 452(c) because arbitrations are not part of the State Bar's function as an administrative arm of the court. (*Id.* at p.325.) FMCS labor arbitrations are acts of an executive department of the United States and, therefore, properly subject to judicial notice under Evidence Code Section 452(c).

Finally, Paratransit claims labor arbitrator decisions should not be judicially noticed because they are about specific collective bargaining agreements. The same is true of every decision of this and every other court. Paratransit's logic would mean no judicial decision or precedential administrative agency decision could ever be cited as authority because every case has its own, specific facts.

Here, just as judicial decisions are cited for the principles and rules of law they state, the labor arbitrator decisions Medeiros asks the Court to judicially notice are cited for principles and rules of federal labor law that apply generally and are not limited to the collective bargaining agreement in any particular case. The legal propositions stated in the labor arbitrator decisions treat the very points of federal labor law that Paratransit contends are relevant.

Evidence Code Section 452(c) authorizes the Court to take judicial notice not only of acts of executive agencies, but acts of the judicial branch as well. Taking judicial notice of a federal agency's labor arbitrator

decisions that state law directly relevant to Paratransit's claims is as proper as taking judicial notice of citable decisions of courts.[2]

CONCLUSION

Labor arbitrator decisions stating and applying federal labor laws are subject to judicial notice under Evidence Code Section 452(c) and (h). The only authority Paratransit relies on, *Brosterhaus v. State Bar* (1995) 12 Cal.4th 315, specifically declined to decide whether the arbitration records at issue there were judicially noticeable, and the rationale for not taking judicial notice in *Brosterhaus* does not apply here. Medeiros's request for judicial notice of the labor arbitrator decisions should be granted.

Dated: July 9, 2013

By: Stephen Goldberg
Stephen E. Goldberg
Attorney for Real Party in Interest
and Appellant Craig Medeiros

[2] Paratransit asks that the entire argument in Medeiros' reply brief where labor arbitrator decisions are cited should be stricken. This is overreaching. At most, the citation to the labor arbitrator decisions could be stricken, but the arguments remain based on other authority and logic.

CERTIFICATE OF SERVICE

I am a citizen of the United States of America and am employed in the County of Sacramento, State of California. I am over the age of eighteen years old and not a party to the within action. My business address is 515 12th Street, Sacramento California 95814.

On July 9, 2013, I served the within [Proposed] Reply in Support of Appellant's Request for Judicial Notice in *Paratransit, Inc. v. Unemployment Insurance Appeals Board (Craig Medeiros),* California Supreme Court Case Number S204221 [Third Appellate Dist. Ct. of Appeal Case No. C063863; Sacramento County Sup. Ct. Case No. 34-2009-80000249-CU-WM-GDS] by placing a true copy enclosed in a sealed envelope, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on this 9th day of July 2013, at Sacramento California

Alexa C. Garza