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www.tnchamber.org

Supreme Court Rules for Business in Tax Case

The Tennessee Supreme Court recently issued a major sales tax decision, agreeing with the position of the Tennessee Chamber and its business community in overturning an appellate court case. In *Eastman Chemical Company vs. Ruth E. Johnson, Commissioner of Revenue, State of Tennessee*, the court ruled that catalysts used in Eastman's chemical processes "fall within the definition of industrial machinery because they are an integral part of the equipment and apparatus used by Eastman." (Johnson was commissioner under former Governor Don Sundquist.)

Those few words restored a long-time precedent in how the current law is applied and stopped a new, and extremely limited interpretation, set out by the Court of Appeals. It will save Tennessee manufacturers significant dollars and ensure their ability to remain competitive in Tennessee. Eastman Chemical was represented by Charles Trost and Mike Stewart of Waller Lansden Dortch & Davis. The Tennessee Chamber filed two "friends of the court" briefs in the case, both by Carl Hartley, John M. Phillips and Sandi L. Pack, all of Baker Donelson Bearman & Caldwell. The first brief urged the Tennessee Supreme Court to review the Court of Appeals decision, and the second brief argued the merits of the case.

"Charlie Trost, Mike Stewart and Carl Hartley all did a tremendous job on this case," said Deb Woolley, president of the Tennessee Chamber. "All three recognized the immediate and severe impact the appellate court ruling would have had on the business community."

"The arguments and critical thinking in the initial brief urging the Supreme Court to review the case were so significant that the Court agreed to hear the case and invited the Chamber to file a full brief on the merits of the case."

"There is no doubt that the Chamber's intervention was critical to this case, first in assuring that court heard it and second in assuring that the Court recognized the total impact of the appellant court ruling on Tennessee's manufacturing community and the state's ultimate economic future."

Rod Irvin, vice president of government relations of Eastman Chemical, said, "The Tennessee Chamber of Commerce & Industry stepping in at the Supreme Court level with both briefs is yet another example of the Chamber's ongoing support for business in our state. Their involvement was a benefit to Eastman; but was also instrumental in protecting the entire Tennessee manufacturing community from additional costs. Their ability to quickly coordinate effective in-the-trenches work as demonstrated in this case makes the Tennessee Chamber a valuable asset for Tennessee's business community."

The sole issue in this case was whether certain chemical catalysts used by Eastman Chemical Company fell within the industrial machinery exemption to the Tennessee sales and use tax statute. The trial court agreed with Eastman, but the Court of Appeals reversed, stating that the chemical catalysts used by the taxpayer did not come within the definition of "industrial machinery" in Tennessee Code Annotated (TCA) section 67-6-102(13)(A) (1998). It was a ruling that could have proved extremely costly to manufacturers across the state.

The Court of Appeals held that the catalysts were not included in the exemption for industrial machinery because they could not be classified as "machinery, apparatus [or] equipment." The Court of Appeals looked to the legislative history of the 1984 amendment, and found that it did not expand the definition of industrial machinery, stating:

The 1984 addition of the words "apparatus" and "equipment" to the definition of industrial machinery in TCA § 67-6-102(a)(13)(A) does not necessarily reflect the General Assembly's desire to broaden the existing exemption

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President's Report

Prepare Now for the New Year

Deborah K. Woolley

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With the holiday seasons of Christmas, Hanukkah and Kwanzaa fast approaching, it almost seems sinful to look forward to January and the next year. But we need to just that if we want to be successful. We could just call it an early New Year's resolution. The 2005 legislative session already is showing a lot of uncertainties.

■ There is a question who will be running the State Senate -- the new Republican majority or another term by Democratic Lt. Governor John Wilder. While Wilder appears to have the Republican support he needs to retain his position of Speaker, the real question is becoming one of control -- over rules and procedures, committee chairmanships and assignments and the Speaker's podium. Republicans are watching carefully to see if Wilder is planning on "business as usual" or whether there will be recognition of and changes in accordance with the new GOP majority.

■ The Governor's decision to cut the cord on TennCare is back under review. There is no doubt that TennCare issues will dominate the next session of the General Assembly; the question is exactly what will be on the table and what will be required from the legislature. Whatever direction the TennCare solution goes, it will have a major impact on the final budget next year. The business community applauds the Governor's decision to bring the TennCare situation under control and continues to support efforts to do as soon as possible. As taxpayers and the largest provider of health insurance coverages, we have long borne the costs of TennCare. We need a solution and our citizens need a solution, but it must one that does not shift another set of costs onto the taxpaying public and bill-paying health care users.

■ The remainder of the Governor's agenda has yet to be rolled out, although there is talk of a major education initiative, perhaps related to pre-kindergarten programs. Education, as we have all learned, is an area for which everyone has his or her own personal "fix," so few education "improvements" garner unanimous support or easy sailing. More and more, the Tennessee business community is expressing strong concerns about the quality of education and its graduates, wondering aloud whether the workforce that is needed is going to be available. We still have a citizenry that values education less than people in other states, and we have a business community that is placing higher and higher requirements on the employees they hire. The divide is getting wider and wider and it will ultimately drive the businesses of the future to other locations.

■ We have every reason to believe that there will be focused efforts to undo some of the workers' compensation reforms enacted in the past session. We must be prepared to play defense and protect the changes that were made in 2004, and we must be prepared to look at any other areas that need reform. Neither will be easy.

We can not expect our elected officials to understand our needs and our challenges if we do not take the responsibility to explain them. The best time to do that, without a doubt, is now -- before the session begins, before the pressure begins. The 2005 session will see 16 freshman in the General Assembly. They go in with every good intention -- and it is our responsibility to make sure they understand the role and impact of government on jobs creation: *Give us a climate in which we can effectively operate and profit, and we will create jobs.* It's that simple.



Employment



New Hire Compliance Benefits Employers, Citizens and Saves Money

Bob Gaskill

Vice President of Employment Issues ★ bob.gaskill@tnchamber.org

Since 1997, all employers have been required to report “new hires” through a program primarily administered by the agency in each state responsible for monitoring child support payments. This system is designed to locate parents who are responsible for child support, even after they change jobs.

In Tennessee, the Department of Human Services is responsible for collecting the data, which is forwarded to a national data base along with the data from all other states. This helps ensure that individuals who change jobs and move from state to state can not escape their responsibility to pay child support.

While most bureaucratic reporting systems are cumbersome, every effort has been made to encourage compliance by providing employers with reasonable options. The Department reports that 80 percent of all employers choose to report online. Even more encouraging, this seems to be a government system that works.

Look at 2003. The Department received about 1.8 million new hire reports. It was able to match about 4,400 new hires with its list of non-custodial parents so financial responsibility could be established or enforcement of existing support orders could occur. It also identified last year about 2,000 Social Security numbers which were invalid.

To learn more about the details and benefits of new hire compliance, visit www.tnnewhire.com.

Because most incorrect Social Security numbers result from typographical errors, correcting the numbers helps businesses, employees and the government.

According to Virginia T. Lodge, Commissioner of the Tennessee Department of Human Services, “Employers have been very responsive to the new hire report, and we are grateful for that. It is critical for employers to know that by complying with the law and making that report, a child is going to receive his or her support. Without child support, too many children fall into poverty and end up relying on public assistance. It is imperative that all parents take financial responsibility for their children.”

Additionally, the Department reports that it has seen double-digit increases in child support collections during the past several years.

Another benefit of compliance is in detecting unemployment benefit payments going to employees who are no longer eligible. The New Hire System feeds unemployment records and highlights those ineligible for benefits. Prior to 1997, unless

employers voluntarily furnished new hire information, the Department of Employment Security could not trace ineligible recipients until the next filing of the quarterly wage reports.

Between July 2003 and June 2004, more than 6,500 over-payments were detected using the new hire information. The Department estimates a savings to the system of about \$5 million annually. When the employee has already received a check, the Department takes legal action, if necessary, to collect the over-payment. The result is about 1,000 wage garnishments a year.

Collecting overpayments not only protects the Unemployment Trust Fund balance, it can actually save employers money on their taxes. Due to the bracketing method of tax determination, tax rates can be affected by a few dollars.

While not major cost savers, the Human Services website also reports that the New Hire Report will be used to combat fraud in workers’ compensation, food stamps, and Temporary Assistance for Needy Families (TANF) programs. Each quarter, employers are sent a bulletin reminding them how the reporting system works and of their responsibilities. Failure to comply with the law can result in fines of \$20 per incident for failure to report or up to a \$400 fine if conspiracy to avoid reporting is determined.

Business Insider





Environment



State's NSR Plan Due in 2006

Wayne K. Scharber

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“Total emissions of the six principal pollutants identified in the Clean Air Act dropped again in 2003, signaling that America’s air is the cleanest ever in three decades, the U.S. Environmental Protection Agency (EPA) reported today. Annual emissions statistics for the six pollutants are considered major indicators of the quality of the nation’s air because of their importance for human health and the existence of their long-standing national standards.”

EPA Press Release, Cynthia Bergman (bergman.cynthia@epa.gov), September 22, 2004.

Even as our economy rebounds, air emissions have continued to decrease more than 150 percent. Since 1970, the aggregate total emissions for the six pollutants [Carbon Monoxide (CO), Nitrogen Oxides (NOx), Sulfur Dioxide (SO2), Particulate Matter (PM), Volatile Organic Compounds (VOCs) and Lead (Pb)] have been cut from 301.5 million tons per year to 147.8 million tons per year, a decrease of 51 percent. Total 2003 emissions were down 12 million tons since 2000, a 7.8 percent reduction. (See a summary table at www.epa.gov/airtrends/econ-emissions.html.) While we take pride in what has been done, there is still more that can be done to further air quality improvements.

On September 22, the state Air Pollution Control Board initiated the rule-making process for the New Source Review (NSR) rules which were promulgated by the EPA in December 2002. Because Tennessee is delegated to enforce its law and rules, it must adopt its own rules and then submit a State Implementation Plan (SIP) that is equivalent or greater than the EPA rules for its approval. The plan must be submitted by January 2006. Major manufacturing industries and jobs will be impacted by the final rules.

January 2006 is not that far away. The process for the Board to prepare the proposed rule, authorize it for Public Notice and Comments, and finally promulgate it is time consuming. The normal time for a rule to proceed through the attorney general’s office and legislative review can easily require six to nine months, especially when it is a lengthy and complicated rule.

The Tennessee Chamber was represented at the September public Board meeting by 11 manufacturing members, demonstrating to TDEC Commissioner Betsy Child and the Board that these rules are important to our manufacturing members. Although the Chamber encouraged the rule-making process to begin much earlier, we recognize that the delay has provided an opportunity for all Board members to become better informed about the rules and what they will accomplish. It is important that all parties -- public and private -- understand that these rules are not standards for air quality. Instead, these rules will provide certainty and clarity to Title V permitted sources. Compliance with the MACT, CAIRS, NAAQS, and NOx SIP Call, etc., will provide further improvements to air quality. The Chamber will work to ensure that the draft rules provide Tennessee industry with certainty and clarity and will not create a more restrictive process than industries in surrounding states.

Lacey Hardin, a state environmental engineer, has been promoted in the Division of Air Pollution Control and has been assigned the responsibility to prepare the draft NSR rules for the Board’s consideration. The Chamber, through the BEST group effort, prepared and presented to Commissioner Child and the Board a starting base of concerns and agreements for these rules. The Chamber will continue to offer assistance to Ms. Hardin and the Department as drafting of the rules proceeds. It is possible that the earliest draft will be available for the December Board meeting but more likely will not be available until later. E-mail notices will make Chamber Air Subcommittee members aware of the dates.

The Chamber will continue to ensure that there is strong industry representation at all Board meetings to move this process forward in a manner that is not detrimental to industry and its ability to profit and create jobs. As we all know, when the business bottom line is healthy, industry then has the resources for improved technologies and further environmental improvements.





National Labor Board Issues Rulings

Deborah K. Woolley

President ★ deb.woolley@tnchamber.org

The Bush-appointed National Labor Relations Board (NLRB) continues to clarify the nation's labor law, restoring long-term precedents that had been reversed by the Clinton-appointed Board. Two significant rulings in late November 2004 issued by the Bush-appointed NLRB restored to long-term precedent and better protected the rights of employees and employers.

A ruling in the *Lutheran Heritage Village-Livonia* (343 No. 75) case clarified some current confusion concerning employer disciplinary rules by significantly strengthening the ability of employers to maintain a harassment-free workplace.

A 1996 ruling by the Clinton Board in the case of *Lafayette Park Hotel* (326 NLRB 824) created considerable confusion concerning employers' ability to maintain policies against abusive language or actions if there were any possibility that an employee might interpret those rules as prohibiting protected activity.

In the Lutheran Village case, the Board, in a 3-2 ruling, approved an employer's prohibitions against "abusive and profane language," "harassment" (without being limited to sexual harassment), and "verbal, physical and mental abuse" by stating that employees would not "reasonably construe" these as prohibiting Section 7 activity.

The Board stated in its ruling, "Where, as here, the rule does not refer to Section 7 activity, we will not conclude that a reasonable employee would read the rule to apply to such activity simply because the rule could be interpreted that way.

To take a different analytical approach would require the Board to find a violation whenever the rule could conceivably be read to cover Section 7 activity, even though that reading is unreasonable."

In a second ruling, the Board addressed an issue concerning workers provided by staffing agencies. By a 3-2 decision, the Board returned to longstanding precedent and held that employees obtained from a labor supplier cannot be included in a unit of permanent employees of the employer to which they are assigned unless all parties consent to the bargaining arrangement (*Oakwood Care Center and N&W Agency, Inc.*, 343 NLRB No. 76).

The decision overturned a Clinton Board's decision in *M.B. Sturgis*, 331 NLRB 1298 (2000), which held that bargaining units that combine employees who are solely employed by a user employer and employees who are jointly employed by the user employer and a supplier employer are permissible under the law. Sturgis had overruled established precedent finding such units to be impermissible, absent consent.

The Board returned to the rule that combined units of solely and jointly employed employees are multi-employer units and are statutorily permissible only with the parties' consent. The Board majority characterized the M.B. Sturgis rule as "misguided both as a matter of statutory interpretation and sound national labor policy."

The majority also stated that national labor policy was better served by limiting Sturgis-type units to cases where all parties consent. Allowing such units

without consent opens the door to significant conflicts among the various employers and groups of employees participating in the collective bargaining process, the Board concluded, by placing multiple employers in the position of negotiating with one another as well as with the union. The Board said these are precisely the types of conflicts that Section 9(b) and the Board's community of interest tests are designed to avoid.

Neutrality Ruling Still Anticipated:

The employer community continues to wait on the Board's ruling in the combined case (*Dana Corp. and Metaldyne Corp.*, 341 NLRB No. 150 (2004) where the employers had granted the unions voluntary recognition based upon a majority authorization card showing, pursuant to neutrality and "card check" agreements between the employers and unions. Employees in each case filed decertification petitions, which were dismissed by the Regional Directors under the Board's long-standing "recognition bar doctrine."

In its decision to review the dismissals of the petitions in these cases, the Board signaled its view that they raise substantial issues as to whether, and under what conditions, an employer's voluntary recognition of a union should bar a decertification petition. The Tennessee Chamber, through its General Counsel, Arnold Perl of Young & Perl, PLC, filed an *amicus curiae* brief in the case.





Federal Law Protects Employees Serving in the Military

Special to the Business Insider

Ronald G. Daves, Esq., of Wimberly Lawson Seale Wright & Daves

More than 420,000 National Guard and reserve service members have been mobilized since September 11, 2001, the largest number since World War II. That mobilization and the service members' return to work can create issues for employers, both legal and practical.

On September 20, 2004, the U. S. Department of Labor (DOL) announced that it published new draft regulations in the federal register that interpret the *Uniformed Services Employment and Reemployment Act* (USERRA). USERRA was passed in 1994 to safeguard the employment rights and benefits of service members upon their return to civilian life. The new regulations spell out the rights of returning service members and employers' responsibility to honor their service. The Bush Administration has expressed its dedication to back up these first-time-ever USERRA regulations with aggressive outreach and enforcement. The regulations explain USERRA's protections against discrimination and retaliation because of military service and how it prevents service members from suffering disadvantages due to their military obligations. It also affords them ample time to report back to their jobs following completion of such obligations.

USERRA provides that individuals may be absent from work for military duty and retain reemployment rights up to five years, with some important exceptions, including initial enlistments lasting more than five years, periodic National Guard and reserve training duty, and involuntary active duty extensions and recalls, especially during a time of national emergency. USERRA establishes that reemployment protection does not depend on the timing, frequency, duration or nature of an individual's service.

The law protects disabled veterans, requiring employers to make reasonable efforts to accommodate disabilities. USERRA also protects the Family and Medical Leave Act (FMLA) rights of service members. Under President Bush's post-September 11 national emergency declaration, such service members should have their active duty time counted towards their eligibility to take time off from work under the FMLA. DOL has issued a memorandum that clarifies its position on the rights of returning uniformed service members to family and medical leave under the USERRA.

USERRA also provides that returning service members be reemployed in the job that they would have attained had they not been absent for military service, with the same seniority, status and pay, as well as other rights and benefits determined by seniority. The law requires that reasonable efforts be made to enable returning members to refresh or upgrade their skills to help them qualify for reemployment. The law provides for alternative reemployment positions if the service member cannot qualify for the "escalator" position. USERRA reaffirms and clarifies that while an individual is performing military service, he or she is deemed to be on a furlough or leave of absence, and is entitled to the non-seniority rights accorded other individuals on non-military leaves of absence.

Health and pension plan coverage for service members is provided under USERRA. Individuals performing military duty of more than 30 days may elect to continue employer-sponsored health care for up to 18 months; however, they may be required to pay up to 102 percent of the full premium. For service of less than 31 days, health care coverage is provided as if the member had remained employed. All pension plans are protected.

The period an individual has to make application for reemployment or report back to work after military service is now based on time spent on military duty; not on the category of service performed. For service of less than 31 days, the member must return at the beginning of the next regularly scheduled work period on the first full day after release, taking into account travel home and an eight-hour rest period. For service between 30 days and 181 days, the member must submit application for reemployment within 14 days of release. For service over 180 days, the application must be submitted within 90 days.

USERRA requires that members provide advanced written or verbal notice to employers for all military duty, unless giving notice is impossible, unreasonable or precluded by military necessity. Additionally, members are able (but are not required) to use accrued vacation or annual leave while performing military duty. Employers or individuals can find out more about USERRA by visiting the DOL website at www.dol.gov/vets, or they may call 1-866-4-USA-DOL.

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Employment

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Supreme Court Victory

far beyond the legislator's collective understanding of the meaning of "machinery." While the dictionary definitions of "machinery," . . . "apparatus," and "equipment" differ slightly, they are essentially synonymous.

The Supreme Court, however, found the lower court's interpretation was contrary to an earlier ruling in an AFG Industry case, where the court specifically found that the amendment with its additional words expanded the definition of industrial machinery. The Court of Appeals further interpreted the definition of industrial machinery as follows:

The phrase "machinery, apparatus and equipment" is broad enough to include (1) the devices conveying the materials and components from one part of the manufacturing or fabricating process to another; (2) the devices such as stamping machines, presses, caldrons, vats, vessels, or chambers where the fabricating or processing occurs, and (3) the devices used to convey the finished products to packing or storage. However, it does not include the fuel used to run the manufacturing devices, the water or other substances used to cool the manufacturing devices or materials, the building housing the manufacturing devices, or the real property on which the manufacturing facility is located. Similarly, it does not include the raw materials or components used to produce the finished items of tangible personal property.

The Supreme Court said the lower court's application of its definition to the catalysts used by Eastman is more flawed than the definition itself. Contrary to the Court of Appeals' suggestion, the Supreme Court found that the catalysts are not raw materials or ingredients used in the production of the goods, but instead are components of the equipment and apparatus used in the manufacturing processes and do not become part of the final product. The catalysts are an integral part of the totality of means whereby the manufacturing processes are accomplished. Without the Supreme Court's critical ruling, overturning the Court of Appeals, Tennessee manufacturers would have found significant new costs as critical components of their manufacturing processes were deemed to be taxable. The full ruling can be found on the Chamber's web site at www.tnchamber.org.

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NLRB Update

General Counsel's Report on Neutrality: NLRB General Counsel Arthur F. Rosenfeld, in an effort to encourage openness and compliance with the law, is issuing periodic reports of decisions raising significant legal or policy issues. A current report (www.nlr.gov/nlr/press/releases/r2544.pdf) presents recent case developments regarding the expanding use of neutrality agreements as an organizational tool.

The general counsel, in his report, acknowledges it has long been settled that an employer and a union violate Section 8(a)(2) and Section 8(b)(1)(A), respectively, by granting and accepting recognition when the union does not have the uncoerced support of a majority of bargaining unit employees. Cases raising familiar questions of illegal assistance to and premature recognition of unions continue to be processed under well-established Board principles.

The report also acknowledges, however, that considerations separate and apart from these traditional issues arise when employers and unions enter into recognition and/or neutrality agreements which, among other concerns, may provide for procedures during organizing campaigns, recognition upon a card check, and the parameters of a future collective-bargaining agreement. It also discusses a case involving prescribed employer speech about the incumbent union to new hires where the parties already have a collective-bargaining relationship.

A Changing Board: With these two significant rulings -- by a slim 3-2 vote in both cases -- the importance of a full, Bush-appointed board is underscored. The five-member Board will soon be reduced to three members, with the terms of both Ronald Meisburg and Dennis Walsh expiring. The Board traditionally only issues major rulings -- such as overturning precedent, with three members voting in the affirmative. The reduced Board, with its 2-1 partisan split, will more than likely result in no other major rulings until new members are confirmed. Because Senate confirmation of any new Board members is expected to take several months or more, the only way we can expect any other sign of rulings is if one or both of the seats are filled by President Bush with recess appointments.



Business Insider



Calendar

2005 Chamber Seminars and Events

Maintenance-Related TOSHA Compliance *\$199-Chamber Members / \$245-Non Members*

February 2 Knoxville, University of Tennessee Conference Center
February 9 Cookeville, Cookeville Area Chamber of Commerce
February 24 Dyersburg, The Lannon Center, Dyersburg Chamber

Basic Safety *\$199-Members / \$245-Non Members*

March 2 Jackson, Location TBA
March 10 Nashville, Associated Builders & Contractors
March 30 Knoxville, UT Conference Center

10-Hour OSHA *\$295-Members / \$345-Non Members*

April 13-14 Morristown, Holiday Inn Conference Center
April 27-28 Nashville, Location TBA

30-Hour OSHA *\$445-Members / \$495-Non Members*

June 7-10 Crossville, Fairfield Glade Resort

Safety Programs *\$199-Members / \$245-Non Members*

May 4 Jackson, Location TBA
May 19 Knoxville, UT Conference Center

TOSHA 101 *\$100-Members / \$125-Non Members (1/2 Day)*

May 17 Nashville, Associated Builders & Contractors
May 24 Jackson, Location TBA
May 26 Morristown, Holiday Inn Conference Center

Noise / Health *\$100-Members / \$125-Non Members (1/2 Day)*

April 5 Knoxville, UT Conference Center
April 19 Jackson, Location TBA
April 7 Nashville, Associated Builders & Contractors

Save the Date!

**March 16, 2005 is the
Tennessee Chamber's Annual
Membership Meeting and
Legislative Reception.**

**Contact the Sheraton-Downtown
Nashville at 1-800-447-9825 for
reservations. Details and a
meeting agenda will be posted at
www.tnchamber.org.**



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