

The Burger Court Opinion Writing Database

NLRB v. J.H. Rutter-Rex Manufacturing Co.

396 U.S. 258 (1969)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University
Forrest Maltzman, George Washington University



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

11/4/69

John

Re No 32

I record three as willing
to dismiss as "I.G." ~~of~~
that is correct I would
join that & maybe we
could avoid an opinion

WBJ

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

November 8, 1969

MEMORANDUM TO THE CONFERENCE

The attached would appear to be the "formula" which some members of the Court referred to as probably applicable to

No. 32 - NLRB v. J. H. Rutter-Rex Manufacturing Co.

Quite frankly the form of the order does not appeal to me. The second sentence if it is retained at all should be altered. I would assume that those who wish to reverse would not want to give the "blessing" implicit in that second sentence. Would it not be advisable to say that "in this posture the case will not be reversed" or something to that effect?

WEB
WEB

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Supreme Court of the United States
Washington, D. C. 20543

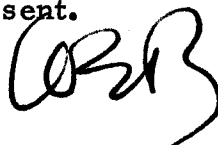
CHAMBERS OF
THE CHIEF JUSTICE

December 10, 1969

Re: No. 32 - NLRB v. Rutter-Rex Mfg. Co.

Dear Bill:

As presently cast to dismiss as improvidently
granted, I will join your dissent.


W. E. B.

Mr. Justice Douglas

cc: The Conference

SUPREME COURT OF THE UNITED STATES

No. 700.—OCTOBER TERM, 1967.

Brooks Lee Anderson, }
Petitioner, } On Writ of Certiorari to the
v. } United States Court of Appeals
Johnson, Warden. } for the Sixth Circuit.

[March 25, 1968.]

PER CURIAM.

Four members of the Court would reverse. Four members of the Court would dismiss the writ as improvidently granted. Consequently, the judgment of the United States Court of Appeals for the Sixth Circuit remains in effect.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HUGO L. BLACK

November 10, 1969

MEMORANDUM FOR THE CONFERENCE

Re: No. 32- O. T. 1969 - NLRB v. J. H. Rutter-Rex
Manufacturing Co.

A per curiam opinion has been circulated in this case which states that Mr. Justice Marshall took no part in the case. Since we now have only eight Justices, that leaves only seven to vote. The circulated per curiam, however, says that four members of the Court would reverse and four members would dismiss the writ as improvidently granted, when there are only seven members to vote. Moreover, it seems to me bad to dispose of this case in this fashion since we will have another Justice before the term is over.

Under those circumstances I think we should not hand down any opinion at all in this case.

Respectfully,


H. L. B.

hlb:fl

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HUGO L. BLACK

December 8, 1969

Dear Thurgood,

Re: No. 32- NLRB v. J.H. Rutter-Rex
Mfg. Co.- CA 5.

I am happy to agree to this well written
opinion.

Sincerely,

Hugs
H. L. B.

Mr. Justice Marshall

cc: Members of the Conference

Mr. Justice Black
Mr. Justice Harlan
Mr. Justice Brennan ✓
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Fortas
Mr. Justice Marshall

SUPREME COURT OF THE UNITED STATES

12/6/69

No. 32.—OCTOBER TERM, 1969.

National Labor Relations Board,
Petitioner,
v.
J. H. Rutter-Rex Manufacturing
Company, Inc., et al. } On Writ of Certiorari
to the United States
Court of Appeals for
the Fifth Circuit.

[December —, 1969]

MR. JUSTICE DOUGLAS, dissenting.

Universal Camera Corp. v. NLRB, 340 U. S. 474, requires an affirmance of the judgment below.

To start with, the Board is allowed a wide field of discretion over awards of back pay against a company found to have committed an unfair labor practice. As the Court said in *Phelps Dodge Corp. v. NLRB*, 313 U. S. 177, 198:

“The remedy of back pay, it must be remembered, is entrusted to the Board’s discretion; it is not mechanically compelled by the Act. And in applying its authority over back pay orders, the Board has not used stereotyped formulas but has availed itself of the freedom given it by Congress to attain just results in diverse, complicated situations.”

Thus the employees in this case have no automatic “right” to any award of back pay.

The *Universal Camera* case concerned the scope of judicial review of orders of the Board. Prior to that decision, many courts had conceived their function of review as an extremely narrow one; some courts looked only for evidence which, when viewed in isolation, substantiated the Board’s findings. Congress registered its dissatisfaction with this restricted scope of review by stating the proper test in the Taft-Hartley Act as one of

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December ninth
1969

Dear John:

I enclose a recirculation in
No. 32 -- NLRB v. Rutter-Rex, which adopts
your suggestion that the writ be dismissed
as improvidently granted.

Since I voted to deny the
cert, it would not be open for me on my
own to dismiss as improvidently granted,
but since you voted to grant, I certainly
could join you and your suggestion. Hence,
I have put it on that ground rather than
affirmance.

William O. Douglas

Mr. Justice Harlan

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To: The Chief Justice
Mr. Justice Black
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Rehnquist
Mr. Justice Marshall

pp 1, 2

SUPREME COURT OF THE UNITED STATES
Douglas, J.

No. 32.—OCTOBER TERM, 1969.

Circulated: _____
Resirculated: 12-9

National Labor Relations Board,
Petitioner,
v.
J. H. Rutter-Rex Manufacturing
Company, Inc., et al.

On Writ of Certiorari
to the United States
Court of Appeals for
the Fifth Circuit.

[December —, 1969]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE HARLAN concurs, dissenting.

Universal Camera Corp. v. NLRB, 340 U. S. 474, requires an affirmance of the judgment below.

To start with, the Board is allowed a wide field of discretion over awards of back pay against a company found to have committed an unfair labor practice. As the Court said in *Phelps Dodge Corp. v. NLRB*, 313 U. S. 177, 198:

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File
Review
12-10

SUPREME COURT OF THE UNITED STATES

No. 32.—OCTOBER TERM, 1969.

National Labor Relations Board, Petitioner, <i>v.</i> J. H. Rutter-Rex Manufacturing Company, Inc., et al.	}	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.
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[December —, 1969]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE HARLAN concurs, dissenting.

Universal Camera Corp. v. NLRB, 340 U. S. 474, requires a dismissal of the judgment below.

To start with, the Board is allowed a wide field of discretion over awards of back pay against a company found to have committed an unfair labor practice. As the Court said in *Phelps Dodge Corp. v. NLRB*, 313 U. S. 177, 198:

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To: The Chief Justice
Mr. Justice Black
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Fortas
Mr. Justice Marshall

SUPREME COURT OF THE UNITED STATES

No. 32.—OCTOBER TERM, 1969.

12 | 10 | 62

National Labor Relations Board,
Petitioner,
v.
J. H. Rutter-Rex Manufacturing
Company, Inc., et al. } On Writ of Certiorari
to the United States
Court of Appeals for
the Fifth Circuit.

[December —, 1969]

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To: The Chief Justice
Mr. Justice Black
Mr. Justice Harlan
Mr. Justice Brennan ✓
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Fortas
Mr. Justice Marshall

SUPREME COURT OF THE UNITED STATES

No. 32.—OCTOBER TERM, 1969. From: Douglas, J.

National Labor Relations Board,
Petitioner,
v.
J. H. Rutter-Rex Manufacturing
Company, Inc., et al.

Dated: 12/12/69
On Writ of Certiorari
to the United States
Court of Appeals for
the Fifth Circuit.

[December —, 1969]

MR. JUSTICE DOUGLAS, with whom THE CHIEF JUSTICE and MR. JUSTICE HARLAN concur, dissenting.

Universal Camera Corp. v. NLRB, 340 U. S. 474, requires a dismissal of the writ.

To start with, the Board is allowed a wide field of discretion over awards of back pay against a company found to have committed an unfair labor practice. As the Court said in *Phelps Dodge Corp. v. NLRB*, 313 U. S. 177, 198:

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN M. HARLAN

November 12, 1969

Re: No. 32 - NLRB v. Rutter-Rex

Dear Chief:

This is a return to your memorandum of November 8, and proposed per curiam for a disposition of this case without a full-dress opinion.

According to my records, the vote for a summary disposition now stands at four to four, i. e., yourself, Douglas, Harlan and Stewart, JJ., being prepared to go along with such a disposition, and Black, Brennan, White and Marshall, JJ., voting to reach the merits and reverse.

If the vote remains in this posture, I would agree with Mr. Justice Black that a summary disposition would not be appropriate with the prospect of a new member coming on the Court (hopefully) shortly. On the other hand, as long as our disposition does not put our stamp of approval on the decision below, I still think that a case which is as much of a "sport" as this one is not deserving of a full-dress opinion, and therefore would hope that another vote could be garnered simply to dismiss the case as improvidently granted. If that is not possible, however, I would then vote to reverse, and in no event do I think the case is worth the further time that setting it for reargument before a full Court would involve.

Sincerely,


J. M. H.

The Chief Justice

CC: The Conference

December 8, 1969

Re: No. 32 - NLEB v. Rutter-Rex

Dear Bill:

Although my final vote at the Conference was to reverse this case, I am persuaded by your opinion that in the particular circumstances here shown, the Court of Appeals cannot be held to have so far strayed off base as to make the teaching of Universal Citizens inapplicable.

I would prefer however to discuss the writ as impendently granted, rather than to affirm, and if you will limit your reservation to a dissent, I will be glad to join your opinion. If this is not agreeable to you, then will you please add at the foot of your opinion the following:

MR. JUSTICE DWIGHT
has opinion in the case that it would discuss the writ of certiorari as impendently granted.

Dwight

J. M. H.

Mr. Justice Dwight

CC: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 11, 1969

RE: No. 32 - National Labor Relations Board
v. Rutter-Rex Mfg. Co.

Dear Thurgood:

Please join me in your opinion in the
above.

Sincerely,



W.J.B. Jr.

Mr. Justice Marshall

December 11, 1969

Dear Thurgood:

Enclosed is a suggestion of one of my clerks, Richard Cooper, in No. 32 - N. L. R. B. v. Rutter-Rex Mfg. Co., which commends itself to me. But I join your opinion anyway.

Sincerely,

Mr. Justice Marshall

in

te
re

I recommend that you join Justice Marshall's opinion.

However, there may be one point on which the opinion can be significantly strengthened. The basic thrust of the opinion is not that the delay by the regional office in administering the back-pay award was excusable, but rather that even if it was unreasonable & inexcusable, the cost of the delay should not be borne by the innocent employees. It seems to me that this argument would be strengthened if it could be shown that the employees themselves had no way to speed up the regional office's processing of the back pay award. And, indeed, so far as I can tell, that is the law. If the point is not ~~clear~~ clearly settled, it's better not to mention it at all; & you can join the opinion as is. On the other hand, if the law is clear that the employees had no remedy for speeding up the regional office, it may be worth suggesting that that point be mentioned in the opinion.

It is quite clear that the right to enforcement of a NLRB order is a "public" rather than a "private" right. Consequently, the authority to apply to a ct app for enforcement of a Bd order lies exclusively with the Bd. *Amalgamated Utility Workers v. Con. Ed.*, 309 U.S. 261 (1940)(Hughes, CJ). Initial court enforcement of a back pay award is interlocutory in nature & contemplates further administrative proceedings by the Bd. *Home Beneficial Life Ins Co. v. NLRB*, 172 F.2d 62 (4th Cir. 1949); 3 CCH Lab. Rep. ¶ 4755.012; 29 CFR § 101.16. And once a ct has granted enforcement, as here, responsibility for securing compliance lies with the Bd. 29 CFR § 101.15. The rt to petition the ct app for a contempt decree lies exclusively with the bd. *Keco Industries v. NLRB*, 40 Lab. Cas. ¶ 66,439 (6th Cir. 1940); 3 CCH Lab. Rep. ¶ 6015 at 11,325. Thus, it would seem clear that the employees in this case had no standing to obtain an order from the ct app (in the nature of mandamus or in some other form) to compel the regional office to act more

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quickly. The remaining question, then, is whether they could have petitioned the regional office itself to act with greater dispatch. Perusal of the Bd's regulations, 29 CFR ~~§~~ § 100.10-.16, does not disclose any provision for such a petition. But the point may not be well settled. I haven't found any guidance in CCH. And since the parties haven't raised the point, perhaps it's just as well to say nothing about it. I thought I should, ~~however~~ however, bring the point to your attention.

RMC

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

December 9, 1969

No. 32 - NLRB v. Rutter-Rex Mfg. Co.

Dear Thurgood,

I am glad to join the opinion you have
written for the Court in this case.

Sincerely yours,

PS
/

Mr. Justice Marshall

Copies to the Conference

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December 8, 1969

Re: No. 32 - HLRB v. J. H. Rutter-
Rex Mfg. Co., Inc.

Dear Thurgood:

Please join us.

Sincerely,

J.R.V.

Mr. Justice Marshall

cc: The Department

STYLISTIC CHANGES THROUGHOUT.

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Fortas

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SUPREME COURT OF THE UNITED STATES

From: Marshall, J.

No. 32.—OCTOBER TERM, 1969.

Circulated: _____

Recirculated: DEC 10 1969

National Labor Relations Board,
Petitioner,
v.
J. H. Rutter-Rex Manufacturing
Company, Inc., et al.

On Writ of Certiorari
to the United States
Court of Appeals for
the Fifth Circuit.

[December —, 1969]

MR. JUSTICE MARSHALL delivered the opinion of the Court.

This case presents the question whether, when an employer has improperly failed to reinstate striking employees, and the National Labor Relations Board has after considerable delay ordered backpay for those employees, a court of appeals may, on account of the delay, modify the Board's order to provide an early cutoff date for backpay. In the circumstances of this case, we hold such a modification to be an unwarranted interference with the Board's remedial power to implement the policies of the National Labor Relations Act.

I

The employees in question chose the Amalgamated Clothing Workers of America, AFL-CIO, as their bargaining representative in January 1954. After three bargaining sessions between the union and the company, the employees went out on strike in April 1954. At that point and thereafter the company refused to bargain further with the union representatives. Charges of unfair labor practices, including a refusal to bargain in good faith, were filed against the company. In April 1955, while these charges were pending, the union termi-

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To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
~~Mr. Justice Fortas~~

SUPREME COURT OF THE UNITED STATES

From: Marshall, J.

No. 32.—OCTOBER TERM, 1969.

Circulated: _____

Recirculated: 12-12-69

National Labor Relations Board,
Petitioner,
v.
J. H. Rutter-Rex Manufacturing
Company, Inc., et al. } On Writ of Certiorari
to the United States
Court of Appeals for
the Fifth Circuit.

[December 15, 1969]

MR. JUSTICE MARSHALL delivered the opinion of the Court.

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