The Burger Court Opinion Writing Database

Taggart v. Weinacker's, Inc.

397 U.S. 223 (1970)

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

January 24, 1970

Re: No. 74 - Taggart v. Weinacker's, Inc.

Dear Bill:

I have re-examined the proposed per curiam in the above and regret I cannot join in it.

(1) No one has made out a preemption case for me. Congress simply did not provide the employer access to the Board and without this, it has not "pre-empted."

(2) The per curiam seems to rest on an "obstruction" point at least in part. My notes show that I urged the presence of the obstruction issue at the time of cert. vote. I cannot rest on the theory I was not aware of the claim.

(3) As the per curiam is presently drafted, I would add a few words on (a) no preemption and (b) no picketing on private property under any circumstances. For me Congress is without power to authorize picketing in a private parking lot as much as in a private dwelling or place of business.

W. E. B.

Mr. Justice Douglas

cc: The Conference

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

SUPREME COURT OF THE UNITED STATES

From: The Chief Justice

No. 74.—October Term, 1969

Circulated: 2/5/70

Clifford Taggart et al., Petitioners, v. Weinacker's, Inc. | On Writ of Certiorari to the Supreme Court of Alabama.

Recirculated: _____

[February —, 1970]

Mr. Chief Justice Burger, concurring.

I am in accord with the Court's action in dismissing this petition as having been improvidently granted. As the opinion of the Court indicates, "the obscure record" and "the fact that only a bare remnant of the original controversy remains" cast serious doubt on whether we have enough before us to pass on the claim of the union that it had a First Amendment right to picket on the private premises of the employer.

The obscure record and the atrophied controversy now remaining have little if any impact—I think none—on the issue of whether the State's jurisdiction over this matter is pre-empted by the National Labor Relations Board's primary jurisdiction over labor disputes. In my view any contention that the States are "pre-empted" in these circumstances is without merit. The protection of private property, whether a home, factory, or store, through trespass laws is historically a concern of state law. Congress has never undertaken to alter this allocation of power, and has provided no remedy to an employer within the National Labor Relations Act (NLRA) to prevent an illegal trespass on his premises.*

*See *People* v. *Goduto*, 21 Ill. 2d 605, 608–609, 174 N. E. 2d 385, 387, cert. denied. 368 U. S. 927 (1961); *Hood* v. *Stafford*, 213 Tenn. 684, 694–695, 378 S. W. 2d 766, 771 (1964); *Moreland Corp.* v. *Retail Store Employees, Local 444*, 16 Wis. 2d 499, 503, 114 N. W. 2d 876, 878 (1962); Broomfield, Presumptive Federal Jurisdiction over Concerted Trespassory Activity, 83 Harv. L. Rev. 532, 555, 562–568 (1970).

Supreme Court of the United States
Washington 25, D. C.

CHAMBERS OF
THE CHIEF JUSTICE

Dear John

Here are my ideas on the "pre-emption" in Taggart, muted considerably from what I really feel. This is being printed up today. Best

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vate premises of the employer.

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No. 74 - Taggart v. Weinacker's

MR. CHIEF JUSTICE BURGER, concurring.

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

CHAMBERS OF
THE CHIEF JUSTICE

February 10, 1970

Re: No. 74 - Taggart v. Weinacker's, Inc.

Dear John:

Thank you for your memo on the above. There are indeed differences which I have with the Court on any theory that Congress has power to legislate anything -- short of an eminent domain taking or an emergency war power -- to authorize trespass under any circumstances. If that is what Garmon meant it ought to be undone and I will surely spare no effort to accomplish that. I do not see this issue as one of a choice between "inconveniencing the employers as opposed to permitting interference by state courts..." With all deference, that is not the issue, at least for me.

The notion that any trespass can ever be authorized by Congress or the Court, invites the kind of retaliation we lived through in Minnesota in the 30's. I watched a filling station owner-operator, who refused to join a union in order to operate his own business, deal with trespass in his own way. A dozen union controlled cars massed in his station and refused to leave. The owner, a husky fellow, went to a hardware store and bought a 20-25 pound mall. He took the first car and shattered its glass, then its hood and fenders and then backed it up with a 12-gauge shotgun which, happily, he did not need to use. The mall was enough!

This is what can happen when orderly processes of law do not protect private property. For me the rule of law is to prevent trespass and the retaliation which is likely to follow unremedied trespass. On my part there is no area of "peripheral concern" or "balancing"; the union's right stops where the nose -- or the land -- of the employer begins.

Regards,

W. E. B.

Mr. Justice Harlan

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

From: The Chief Justice

Circulated:

Recirculated: 2/16/70

SUPREME COURT OF THE UNITED STATES

No. 74.—October Term, 1969

Clifford Taggart et al., Petitioners, v. Weinacker's, Inc. | On Writ of Certiorari to the Supreme Court of Alabama.

[February —, 1970]

Mr. Chief Justice Burger, concurring.

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*See *People* v. *Goduto*, 21 Ill. 2d 605, 608–609, 174 N. E. 2d 385, 387, cert. denied. 368 U. S. 927 (1961); *Hood* v. *Stafford*, 213 Tenn. 684, 694–695, 378 S. W. 2d 766, 771 (1964); *Moreland Corp.* v. *Retail Store Employees, Local 444*, 16 Wis. 2d 499, 503, 114 N. W. 2d 876, 878 (1962); Broomfield, Presumptive Federal Jurisdiction over Concerted Trespassory Activity, 83 Harv. L. Rev. 532, 555, 562–568 (1970).

WOD

October 3, 1969

Dear Chief,

Re: No. 74 - O. T. 1969
Taggert v. Weinacker's Inc.

Please note the following in the above case:

"MR. JUSTICE BLACK dissents from the denial of certiorari, believing that it is clear under this Court's decision in San Diego Bldg. Trades Council v. Garmon, 359 U. S. 236 (1959), that the state's jurisdiction in this case is preempted by the NLRB's primary jurisdiction over labor disputes. He would grant certiorari and reverse the judgment below."

Sincerely,

H. L. B.

The Chief Justice

cc: Members of the Conference

January 22, 1970.

Dear Bill,

Re: No. 74 - Clifford Taggart, et al. v. Weinackers, Inc.

I regret that I cannot agree to your Per Curiam in this case because I would hold under San Diego Building Trades Council v. Garmon, 359 U. S. 236, that the State's jurisdiction in the case is preempted by the National Labor Relations Board's primary jurisdiction over labor disputes.

Should the Court hold that the case is here and must be decided on the merits of the First Amendment issue, I would then vote to affirm on the basis of my dissent in Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. at p. 327.

Sincerely,

H. L. B.

Mr. Justice Douglas

cc: Members of the Conference

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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

January 19, 1970

Memorandum to: Justice Brennan
Justice Stewart
Justice White
Justice Marshall

Re: No. 74 -- Taggart v.
Weinacker's, Inc.

Justices Brennan, Stewart, White, Marshall and I voted to dismiss as improvidently granted and I was asked to try my hand at an opinion.

I attach a draft with the request that you send me any suggestions, so that if this does not turn out to be a practical solution, the matter can be returned to the Conference.

WOD

William O. Douglas

SUPREME COURT OF THE UNITED STATES

No. 74.—October Term, 1969

Clifford Taggart et al., Petitioners, *v.* Weinacker's, Inc.	On Writ of Certiorari to the Supreme Court of Alabama.

[January —, 1970]

Per Curiam.

The complaint in this case was filed January 20, 1965, and the state court isued a temporary injunction on January 22, 1965. After hearing, the state court issued a permanent injunction on April 1, 1965. On April 9, 1965, an appeal was taken to the Supreme Court of Alabama. Over three years later on September 19, 1968, that court entered a judgment of affirmance. The petition for certiorari was filed here on March 28, 1969, and granted on October 13, 1969.

At the time the appeal was taken to the Supreme Court of Alabama, respondent operated a grocery and drug business on the premises which petitioners picketed. Late in 1966, while the appeal was pending in the Supreme Court of Alabama, respondent ceased to operate the grocery and drug business, leasing part of the space to Delchamps, Inc., for a retail grocery store and part to Walgreen's Inc. for a retail drug store. Respondent continues to own the land and the building at the site and maintains an office in the building. The injunction enjoins petitioners from "trespassing upon the property of the complainant and from further interfering with the complainant's property and right of ingress and egress to the complainant's property and place of business, until the further orders of this Court."

Journal

SUPREME COURT OF THE UNITED STATES

No. 74.—October Term, 1969

Clifford Taggart et al., Petitioners, v. Weinacker's, Inc.	On Writ of Certiorari to the Supreme Court of Alabama.

[January —, 1970]

Per Curiam.

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At the time the appeal was taken to the Supreme Court of Alabama, respondent operated a retail grocery and drug business on the premises which petitioners picketed. Late in 1966, while the appeal was pending in the Supreme Court of Alabama, respondent ceased to operate the grocery and drug business, leasing part of the space to Delchamps, Inc., for a retail grocery store, and part to Walgreen's, Inc., for a retail drug store. Respondent continues to own the land and the building at the site and maintains an office in the building. The injunction enjoins petitioners from "trespassing upon the property of the complainant and from further interfering with the complainant's property and right of ingress and egress to the complainant's property and place of business, until the further orders of this Court."

AGREES: WJB, PS, BW,

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

Mr. Justice Douglas, J.

No. 74.—October Term, 1969

Circulated: 1-22

Recirculated:

Clifford Taggart et al., Petitioners, *v.* Weinacker's, Inc.	On Writ of Certiorari to the Supreme Court of Alabama.

[January —, 1970]

Per Curiam.

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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

P4

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SUPREME COURT OF THE UNITED STATES

From: Douglas, J.

No. 74.—October Term, 1969

Circulated:

Recirculated: 1-23

Clifford Taggart et al., Petitioners, *v.* Weinacker's, Inc.	On Writ of Certiorari to the Supreme Court of Alabama.

[January —, 1970]

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February 5, 1970

Re: No. 74 - Taggart v. Weinacker's, Inc.

Dear Chief:

I appreciate your having given me a preview of your revised concurrence in this case, and in light of it I have again reviewed my own position in the matter. This is a difficult area, and the differences between us underscore, I think, the desirability of a disposition on the merits.

While I share your concern with the void created by an application of the preemption doctrine that results when Board procedures and rules for litigating the protected status of conduct afford the employer no quick opportunity to establish the unlawful nature of "trespassory" picketing, the issue was, I think, anticipated and dealt with by Garmon. There the majority opted, over my own misgivings (359 U.S. 236, 249), in favor of inconveniencing the employers as opposed to permitting interference by state courts in less than extreme circumstances. The test, as I understand it, requires focusing on the degree of interest the State has in regulating the particular activity and protecting the allegedly breached right and also the intimacy of the relationship of the disputed activity to the primary concerns of the national labor act.

Following this approach my conclusion is that unfair labor practice organizational picketing, such as that carried on here, is so intimately related to fundamental §7 and §8 policies that it would require violence (or the threat of imminent violence) before state intervention should be permitted. I view the Linn case as turning primarily on the Court's determination that the

issue there was of "peripheral concern" and consider that it basically reaffirms the Garmon approach -- that preemption is the basic rule until Congress manifests an intention to the contrary.

The foregoing considerations lead me to adhere to my vote to reverse in the present case.

Sincerely,

JMH

The Chief Justice

SUPREME COURT OF THE UNITED STATES

No. 74.—October Term, 1969

Clifford Taggart et al., Petitioners, v. Weinacker's, Inc. | On Writ of Certiorari to the Supreme Court of Alabama.

[March —, 1970]

Separate Memorandum of Mr. Justice Harlan.

I am prompted by the concurring opinion of The Chief Justice in this case, and by the concurring opinion of Mr. Justice White (joined by The Chief Justice and Mr. Justice Stewart) in *International Longshoremen's Local 1416* v. *Ariadne Shipping Co., Ltd.*, — U. S. —, No. 231, decided today, *ante*, —, to amplify, with the following observations, my vote to grant certiorari and reverse this state judgment in the present case.

I would have thought this an easy case after *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, wherein the Court concluded, in the broadest terms, that conduct that is either "arguably protected" or "arguably prohibited" under the federal labor laws is not subject to regulation by the States. In such cases the Court held that federal law and federal remedies apply to the exclusion of any state rules, and that whether federal law does apply is to be decided in the first instance by the National Labor Relations Board in accordance with the policy of "primary jurisdiction" established by the National Labor Relations Act. It was concluded that the Board's jurisdiction was pre-emptive notwithstanding the fact that access to the Board was barred by its refusal to exercise jurisdiction because of failure to meet the dollar amount requirements.

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

CHAMBERS OF
JUSTICE POTTER STEWART

January 19, 1970

74 - Taggart v. Weinacker's, Inc.

Dear Bill,

I think your draft Per Curiam in this case is fine, with two minor suggestions:

(1) The state trial court apparently never actually issued a permanent injunction, although what it did was obviously tantamount to a grant of permanent relief to the plaintiffs. Accordingly, I suggest that the sentence on lines 2 and 3 be changed to read, "After hearing, the state court on April 1, 1965, denied petitioner's motion to dissolve the temporary injunction and continued it in effect."

(2) There seems to be a typographical error below the middle of page 2, in the repetition of two very similar clauses. Also, I have not been able to find where in the record the dimensions and precise location of the inner sidewalk appear.

Sincerely yours,

P.S.

Mr. Justice Douglas

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

CHAMBERS OF
JUSTICE POTTER STEWART

January 22, 1970

No. 74 - Taggart v. Weinacker's, Inc.

Dear Bill,

I am glad to join the Per Curiam you have circulated in this case.

Sincerely yours,

P.S.

Mr. Justice Douglas

Copies to the Conference

January 21, 1970

Re: No. 74 - Taggart v. Weinacker's, Inc.

Dear Bill:

With some change in the last sentence of the paragraph on the top of page two, I should think the *per curiam* dismissal could end there. The rest of the opinion seems to assume that *Logan Valley* is applicable to the property involved in this case, an assumption with which I am not now in accord.

Although you will perhaps find this suggestion unacceptable, I would take the long paragraph on page two [illegible] part of the last sentence before the quotation were changed to read as follows:

"Even if under *Food Employees v. Logan Valley Plaza*, 391 U.S. 308, the union has a First Amendment right to picket on the property involved in this case, a [illegible] we need not decide, [illegible] the physical circumstances [illegible] at their store entrance the following ruling in *Logan Valley*, 391 U.S., at 320-321, is applicable:"

Sincerely,

[illegible]

Mr. Justice Douglas

[illegible]

January 22, 1970

Re: No. 74 - Tagsart v. Weinacker's

Dear Bill:

I join your per curiam.

Sincerely,

W.O.D.

Mr. Justice Douglas

Supreme Court

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 21, 1970

Re: No. 74 - Taggart v. Weinacker's Inc.

Dear Bill:

Please join me in your per curiam.

Sincerely,

T.M.

Mr. Justice Douglas

cc: The Conference