

The Burger Court Opinion Writing Database

Linden Lumber Division, Summer & Co. v. NLRB

419 U.S. 301 (1974)

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



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

CHAMBERS OF
THE CHIEF JUSTICE

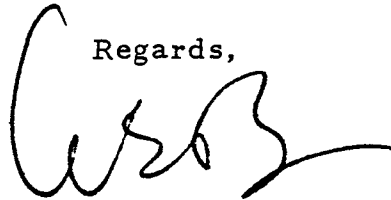
December 20, 1974

Re: (73-1231 - Linden Lumber Division, Summer & Co.
(v. NLRB
(73-1234 - NLRB v. Truck Drivers Union Local

Dear Bill:

Please join me.

Regards,



Mr. Justice Douglas

Copies to the Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

To The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 73-1231 AND 73-1234

Circulate: 12-2

Recirculate:

Linden Lumber Division, Summer & Co., Petitioner,
73-1231 v.

National Labor Relations Board et al.

National Labor Relations Board, Petitioner,
73-1234 v.

Truck Drivers Union Local No. 413 et al.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[December —, 1974]

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

These cases present a question expressly reserved in *National Labor Relations Board v. Gissel Packing Co.*, 395 U. S. 575, 595, 601, n. 18 (1969).

In *Linden* respondent union obtained authorization cards from a majority of petitioner's employees and demanded that it be recognized as the collective-bargaining representative of those employees. Linden said it doubted the union's claimed majority status and suggested the union petition the Board for an election. The union filed such a petition with the Board but later withdrew it when Linden declined to enter a consent election agreement or abide by an election on the ground that respondent union's organizational campaign had been improperly assisted by company supervisors. Respondent union thereupon renewed its demand for collective bargaining;

Memorandum
to the Chief Justice:
On the time it took to prepare the
disposit in this case
JH

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 4-8

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

3rd DRAFT

From: Douglas; J.

SUPREME COURT OF THE UNITED STATES

Circulate: _____

Nos. 73-1231 AND 73-1234

Recirculate: 12-17

Linden Lumber Division, Sum-
mer & Co., Petitioner,
73-1231 v.

National Labor Relations
Board et al.

National Labor Relations
Board, Petitioner,
73-1234 v.

Truck Drivers Union Local
No. 413 et al.

On Writs of Certiorari
to the United States
Court of Appeals for
the District of Colum-
bia Circuit.

[December —, 1974]

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

These cases present a question expressly reserved in *National Labor Relations Board v. Gissel Packing Co.*, 395 U. S. 575, 595, 601, n. 18 (1969).

In *Linden* respondent union obtained authorization cards from a majority of petitioner's employees and demanded that it be recognized as the collective-bargaining representative of those employees. Linden said it doubted the union's claimed majority status and suggested the union petition the Board for an election. The union filed such a petition with the Board but later withdrew it when Linden declined to enter a consent election agreement or abide by an election on the ground that respondent union's organizational campaign had been improperly assisted by company supervisors. Respondent union thereupon renewed its demand for collective bargaining;

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 3, 1974

RE: Nos. 73-1231 and 72-1234 - Linden Lumber, etc.
v. N.L.R.B. and N.L.R.B. v. Truck Drivers, etc.

Dear Bill:

I agree.

Sincerely,

Bill

Mr. Justice Douglas

cc: The Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

November 20, 1974

MEMORANDUM TO: Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell

Re: No. 73-1231, Linden Lumber v. NLRB
No. 73-1234, NLRB v. Truck Drivers

If agreeable to you, I shall undertake to write a
dissenting opinion in these cases in due course.

PS
P. S.

PS
I agree with you
respond to do the
dissent and share case
74!

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

CHAMBERS OF
JUSTICE POTTER STEWART

December 3, 1974

Re: Nos. 73-1231 and 73-1234
Linden Lumber Div. v. NLRB

MEMORANDUM TO THE CONFERENCE

I expect to circulate a dissenting opinion in these cases in due course.

P.S.
P. S.

*Wait for the
dissent*

✓
REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

To: The Chief Justice ✓
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice White
~~Mr.~~ Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

1st DRAFT

SUPREME COURT OF THE UNITED STATES ^{FRANK} Stewart, J.

Nos. 73-1231 AND 73-1234

Circulated: DEC 12 1974

Recirculated: _____

Linden Lumber Division, Summer & Co., Petitioner,
73-1231 v.

National Labor Relations Board et al.

National Labor Relations Board, Petitioner,
73-1234 v.

Truck Drivers Union Local No. 413 et al.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[December —, 1974]

MR. JUSTICE STEWART, dissenting.

Under a recently adopted Board policy, an employer who does not commit independent unfair labor practices prejudicing the holding of a fair election has an absolute right to refuse to bargain with a union selected by a majority of his employees until that union petitions for and wins a Board-supervised election. I cannot agree with the Court's conclusion that this Board policy constitutes a permissible interpretation of §§ 8 (a)(5) and 9 (a) of the Act.¹ Accordingly, I would affirm the judgment of the Court of Appeals remanding the case to the

¹Section 9 (a) of the Act, 29 U. S. C. § 159 (a), provides that "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees of a unit appropriate for such purposes shall be the exclusive representatives of all the employees" Section 8 (a) (5), 29 U. S. C. § 158 (a) (5), makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159 (a) of this title."

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 73-1231 AND 73-1234

Circulated: _____

Recirculated: DEC 17 1974

Linden Lumber Division, Sum-
mer & Co., Petitioner,
73-1231 v.

National Labor Relations
Board et al.

National Labor Relations
Board, Petitioner,
73-1234 v.

Truck Drivers Union Local
No. 413 et al.

On Writs of Certiorari
to the United States
Court of Appeals for
the District of Colum-
bia Circuit.

[December —, 1974]

MR. JUSTICE STEWART, with whom MR. JUSTICE WHITE
and MR. JUSTICE POWELL join, dissenting.

Under a recently adopted Board policy, an employer who does not commit independent unfair labor practices prejudicing the holding of a fair election has an absolute right to refuse to bargain with a union selected by a majority of his employees until that union petitions for and wins a Board-supervised election. I cannot agree with the Court's conclusion that this Board policy constitutes a permissible interpretation of §§ 8 (a) (5) and 9 (a) of the Act.¹ Accordingly, I would affirm the judgment of the Court of Appeals remanding the case to the

¹ Section 9 (a) of the Act, 29 U. S. C. § 159 (a), provides that "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees of a unit appropriate for such purposes shall be the exclusive representatives of all the employees" Section 8 (a) (5), 29 U. S. C. § 158 (a) (5), makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159 (a) of this title."

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 13, 1974

Re: Nos. 73-1231 & 73-1234 - Linden Lumber Div.
v. NLRB

Dear Potter:

Please join me in your dissent in this
case.

Sincerely,



Mr. Justice Stewart

Copies to Conference

Wm. Douglas
0074

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

November 21, 1974

Re: No. 73-1231 -- Linden Lumber v. NLRB
No. 73-1234 -- NLRB v. Truck Drivers

Dear Potter:

I agree with your proposal to do the dissent in
these cases.

Sincerely,

T.M.

T.M.

Mr. Justice Stewart

cc: Mr. Justice White
Mr. Justice Powell

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

December 17, 1974

Re: Nos. 73-1231 and 73-1234 -- Linden Lumber Division,
Summer & Co. v. National Labor Relations Board;
National Labor Relations Board v. Truck Drivers
Union Local No. 413

Dear Potter:

Please join me in your dissent.

Sincerely,

T.M.

T. M.

Mr. Justice Stewart

cc: Mr. Justice Stewart

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 16, 1974

Re: No. 73-1231 - Linden Lumber Div. Summer Co. v. NLRB
No. 73-1234 - NLRB v. Truck Drivers Union No. 413

Dear Bill:

Please join me.

Sincerely,



Mr. Justice Douglas

cc: The Conference

November 21, 1974

No. 73-1231 Linden Lumber v. NLRB
No. 73-1234 NLRB v. Truck Drivers Union

Dear Potter:

At conference I think my vote was recorded to reverse the Court of Appeals, as I could not endorse its entire position. On further reflection, I believe my views would support the CADC judgment, but with modification of its instructions to the Board on remand. Accordingly, I have advised the Chief that my vote should be to affirm.

Gissel held that the duty to bargain under 8(a)(5) and 9(a) may arise without an election, and I read it as indicating that the burden is on an employer to bargain with a union when in fact there is "convincing evidence" of majority support. But, as Gissel suggested, in the absence of relevant unfair labor practices an employer may always escape the bargaining obligation by filing an election petition.

I would go this far with CADC, but I also would remand to the Board with instructions to adopt standards as to what constitutes "convincing evidence". I would not approve CADC's suggestion that the Board should return to a "good faith doubt" or "independent knowledge" standard. I would honor the Board's conclusion that a subjective rule breeds unnecessary litigation. Instead I would suggest that the Board formulate objective standards defining "convincing evidence." Objectivity should be possible, and the Board's experience with elections should enable it to define degrees and types of informal support that would correlate reliably with election results. I believe such an objective approach should be designed to protect employee choice and avoid litigation over what evidence is "convincing." If an

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

November 21, 1974

No. 73-1231 Linden Lumber v. NLRB
No. 73-1234 NLRB v. Truck Drivers

Dear Chief:

At the Wednesday afternoon Conference (which you missed), I stated that my position on the above case was not wholly in accord either with that of the Board or CADC. Accordingly, I could neither affirm nor reverse without qualification. I recorded my vote to "reverse".

On further consideration, I believe I am closer to an "affirm" position. I would support the CADC judgment to remand, but would modify its instructions to the Board.

There is a majority to reverse without my vote. I understand that Potter will draft a dissenting opinion supporting CADC's judgment. I will possibly join him or write separately.

Sincerely,

Lewis

The Chief Justice

lfp/ss

cc: The Conference

December 16, 1974

No. 73-1231 LINDEN LUMBER

Dear Potter:

Your dissent in the above case is excellent, and I will be happy to join it in its entirety if you will consider one change.

I do not think a "bare majority" is a dependable basis for certification, especially in smaller units. Such a rule would make it too easy to shift the burden of calling an election to the employer.

I therefore suggest something along the lines of the enclosed.

Sincerely,

Mr. Justice Stewart

LFP/gg

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

December 16, 1974

No. 73-1231 Linden Lumber v. NLRB

Dear Potter:

Please join me in your dissent.

Sincerely,

Lewis

Mr. Justice Stewart

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

December 5, 1974

Re: Nos. 73-1231 and 73-1234 - Linden Lumber v. NLRB

Dear Bill:

Please join me.

Sincerely,
WHR

Mr. Justice Douglas

Copies to the Conference