The Burger Court Opinion Writing Database

Machinists v. Wisconsin Employment Relations Commission

427 U.S. 132 (1976)

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

June 23, 1976

Re: 75-185 - Lodge 76, Intl. Assoc. of Machinists and Aerospace Workers, AFL-CIO v. Wisconsin Employment Relations Commission

Dear Bill:

I am asking Lewis to show me as joining him in the concurrence that in turn joins you.

Regards,

WEB

Mr. Justice Brennan

Copies to the Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 28, 1976

MEMORANDUM TO THE CONFERENCE

RE: No. 75-185 Lodge No. 76, International Assn. etc. v. Wisconsin Employment Relations Commission, et al.

My recollection is that our conference discussion did not directly address whether Briggs-Stratton should be expressly overruled. Our earlier decisions as developed in the enclosed establish that it has in fact been overruled. The circulation therefore merely formalizes the demise.

Bill

W.J.B. Jr.

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

From: Mr Justice Brennan

Circulated: 5/29/76

Recirculated: _____

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75–185

Lodge 76, International Association of Machinists and Aerospace Workers, AFL–CIO, et al., Petitioners, *v.* Wisconsin Employment Relations Commission et al.

On Writ of Certiorari to the Supreme Court of Wisconsin.

[June —, 1976]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The question to be decided in this case is whether federal labor policy pre-empts the authority of a state labor relations board to grant an employer covered by the National Labor Relations Act an order enjoining a union and its members from continuing to refuse to work overtime pursuant to a union policy to put economic pressure on the employer in negotiations for renewal of an expired collective-bargaining agreement.

A collective-bargaining agreement between petitioner Local 76 (the Union) and respondent, Kearney and Trecker Corporation (the employer) was terminated by the employer pursuant to the terms of the agreement on June 19, 1971. Good-faith bargaining over the terms of a renewal agreement continued for over a year thereafter, finally resulting in the signing of a new agreement effective July 23, 1972. A particularly controverted issue during negotiations was the employer's demand that the provision of the expired agreement under which, as for the prior 17 years, the basic workday was seven and one-

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 17, 1976

Memorandum to the Conference

Re: Lodge 76, International Ass'n of Machinists v. Wisconsin Employment Relations Comm'n, No. 75-185

John indicates in his circulation in this case that my draft opinion finds the conduct at issue "unprotected" by § 7 of the NLRA, and that therefore there is no Garmon-type preemption problem lying in the background. Actually, I intended, as I thought the analysis on pp. 20-21 & n. 14 made clear, to leave open the question respecting whether the conduct at issue is protected, and in my view there is indeed a substantial Garmon issue if the preemption determination in this case does not go off on Morton grounds -- a result which I of course consider to be the correct one.

Certainly the parties in their briefs spend a substantial portion of their time arguing whether this concerted ban on overtime is "arguably protected" by § 7 under NLRB precedents, see Brief for Petitioners at 28-30; Brief for Respondent Kearney & Treacher at 11-18; Brief for Respondent Wisconsin Employment Relations Comm'n at 7-13; Reply Brief for Petitioners at 4-5; and the NLRB in its amicus brief at 5-6 n. 4 argues that the conduct is indeed "arguably protected." As indicated in the circulated draft at 20-21 n. 14, the problem respecting whether the conduct involved in this case is arguably protected stems from two lines of NLRB decisions. One line of precedent begins with John S. Swift Co., 124 N. L. R. B. 394 (1959), which held an employer not to be in violation of § 8(a)(3) by virtue of its discharge of employees who engaged in a concerted overtime ban. The employer had ordered the employees, "under pain of discharge," to work overtime, and the refusal to do so by the employees was found to constitute "an attempt to work on terms prescribed solely by themselves" and hence to be unprotected. Id., at 397. This precedent was implicitly followed in Decisions, Inc., 166 N. L. R. B. 464 (1967), where an employer was found not in violation of § 8(a)(1) in a similar set of circumstances.

However, another line of NLRB precedent begins with Dow Chemical Co., 152 N. L. R. B. 1150 (1965), where the Board found a violation of § 8(a)(1) when an employer discharged for participation in a concerted overtime ban; the refusal being expressly held protected under § 7. Id., at 1151. John S. Swift was distinguished as involving a refusal to perform "scheduled overtime work", 152 N. L. R. B., at 1152 (emphasis in original), and as an instance where the employer had ordered the employees "under pain of discharge to work overtime." Ibid.

> "Here, however, [the employee's] discharge was based in substantial part on her activity connected with the refusals to volunteer for work on March 7-8, and on March 7-8 . . . weekend work was still voluntary. In such circumstances, since the employer had already agreed to permit employees to decide for themselves whether they wished to work on weekends, we cannot say that employees, by refusing to volunteer for work, lost the protection of the Act because they sought to impose on their employer their own conditions of employment. Nor do the facts that about March 6 employees also discussed plans not to volunteer for work on March 14-15, that an employee mentioned this possibility to the Respondent, and that on March 9 the Respondent directed inspectors to work on March 14-15, require a different conclusion. In the first place, the record shows that employees considered refusing to volunteer for work on both weekends only because at the time of these discussions weekend work was still voluntary." Ibid.

The logic of the Dow decision is followed in the most recent Board decision, Prince Lithograph, Inc., 205 N. L. R. B. 110 (1973). There an employer was found not to be in violation of § 8(a)(3). The concerted refusal to work overtime was found by the examiner to be protected activity as the bargaining agreement provided that all overtime was to be voluntary, but the employer was found not in violation because the employee involved was not discharged but merely replaced and was retained on a preferential hiring list. Id., at 115.

The Board adopted the examiner's view that

> "Respondent was merely replacing an employee who engaged, at the instance of the Union, in a partial strike by participating in a concerted refusal to work overtime. Such activity, as the Administrative Law Judge below found, gives rise to a countervailing right of the Employer to utilize replacements in order that the necessary work may be performed. That was done here, and we perceive no violation of the Act to have resulted." Id., at 110 n. 2.[1/]

The facts in the instant case so far as can be determined fall somewhere between these two lines of precedent. The previous bargaining agreement which was terminated by the employer had a management clause which, while not addressing overtime specifically, stated:

> "The Management of the work and the direction of the working force including the right to hire, suspend or discharge for just cause, to assign to jobs, to transfer employees, to increase or decrease the working force, to determine products to be handled, produced or manufactured, the schedules and standards of production, and the methods, processes, or means of producing or handling, is vested exclusively in the Company, provided this right shall not be used for the purpose of discriminating against any member of the Union or to avoid any of the express provisions of this Agreement." App., at 50.[2/]

1/ Yet a third line of NLRB precedent holds that a concerted refusal to work overtime in a Washington Aluminum (370 U.S. 9) situation is activity protected by § 7. Polytech, Inc., 195 N.L.R.B. 695 (1972).

2/ See next page.

However, the Wisconsin Employment Relations Board expressly found that "by custom and understanding none of the employees represented . . . had been required to work daily or weekly overtime prior to March 7, 1972" (although noting that the average rate of refusal was low prior to the concerted ban). Pet. for Writ of Cert., at 32. See also the summarization of the evidence in the record on this point in Reply Brief for Petitioners at 4-5.

In my view these NLRB precedents, turning as they do on precise factual distinctions, cannot when applied to the facts of this case result in a conclusion that the issue of § 7 protection has been settled by the Board "with unclouded legal significance." My circulated draft makes clear my view that this case is controlled by Insurance Agents and Morton,[3/] and hence there is no reason to

---

2/ The previous agreement also contained the following provision, which may or may not address the issue of whether overtime is voluntary with the employee:

> "Requirements of a Competent Workman
> for Overtime Purposes Only
>
> "Overtime assignments are made to expedite jobs which have fallen behind schedule for various reasons, or to assure the delivery of customer's machine in the time specified on the order, so as to prevent cancellations or possible loss of future orders. Generally, when overtime is necessary a job has become critical and nothing can stand in the way of its completion."

3/ I note in passing that John observes that the "question whether pre-exemption extends to activity that is neither arguably protected nor arguably prohibited" is a question "[which] Garmon poses but does not answer." Dissent at 3 n. 3. That may be so but it is certainly answered in the affirmative by Morton and Oliver among others.

reach the Garmon issue -- a position I thought a majority had taken at conference. I write this note, however, simply to make plain that if this case is not to be decided on Insurance Agents and Morton there exists a substantial Garmon-type preemption problem which must be addressed.

WJB, Jr.

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

CHAMBERS OF
JUSTICE POTTER STEWART

June 17, 1976

Re: No. 75-185, Machinists v. Wisc. Commn

Dear John,

I should appreciate your adding my name to your dissenting opinion.

Sincerely yours,

P.S.

Mr. Justice Stevens

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 31, 1976

Re: No. 75-185 - Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Commission

Dear Bill:

Please join me.

Sincerely,

Byron

Mr. Justice Brennan

Copies to Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 1, 1976

Re: No. 75-185 --Lodge 76, International Association of Machinists and Aerospace Workers, AFL-CIO v. Wisconsin Employment Relations Commission

Dear Bill:

Please join me.

Sincerely,

T.M.

Mr. Justice Brennan

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 18, 1976

Re: No. 75-185 - Lodge 76 v. Wisconsin Employment Relations Commission

Dear Bill:

Please join me.

Sincerely,

Harry

Mr. Justice Brennan

cc: The Conference

LFP/gg 6-21-76

J

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

From: Mr. Justice Powell

Circulated: _____

Recirculated: _____

No. 75-185 MACHINISTS v. WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MR. JUSTICE POWELL, concurring.

The Court correctly identifies the critical inquiry with respect to preemption as whether "the exercise of plenary state authority to curtail or entirely prohibit self-help would frustrate effective implementation of the Act's processes." Railroad Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 380 (1969). See p. ___ ante.

This is equally true whether the self-help activities are those of the employer or the union. I agree with the Court that the Wisconsin law, as applied in this case, is preempted since it directly curtails the self-help capability of the union and its members, resulting in a significant shift in the balance of free economic bargaining power struck by Congress. I write to make clear my understanding that the Court's opinion does not, however, preclude the States from enforcing, in the context of a labor dispute, "neutral" state statutes or rules of decision: state laws that are not directed toward altering

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

From: Mr. Justice Powell

Circulated: _____

Recirculated: JUN 22 1976

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-185

Lodge 76, International Association of Machinists and Aerospace Workers, AFL-CIO, et al., Petitioners, *v.* Wisconsin Employment Relations Commission et al.	On Writ of Certiorari to the Supreme Court of Wisconsin.

[June —, 1976]

MR. JUSTICE POWELL, concurring.

The Court correctly identifies the critical inquiry with respect to pre-emption as whether "the exercise of plenary state authority to curtail or entirely prohibit self-help would frustrate effective implementation of the Act's processes." *Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U. S. 369, 380 (1969). See p. —, *ante*.

This is equally true whether the self-help activities are those of the employer or the union. I agree with the Court that the Wisconsin law, as applied in this case, is pre-empted since it directly curtails the self-help capability of the union and its members, resulting in a significant shift in the balance of free economic bargaining power struck by Congress. I write to make clear my understanding that the Court's opinion does not, however, preclude the States from enforcing, in the context of a labor dispute, "neutral" state statutes or rules of decision: state laws that are not directed toward altering the bargaining positions of employers or unions but which may have an incidental effect on relative bargain-

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 11, 1976

Re: No. 75-185 - Lodge 76 v. Wisconsin Employment Relations Commission

Dear Bill:

I shall await John's dissent in this case.

Sincerely,

WHR

Mr. Justice Brennan

Copies to the Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 18, 1976

Re: No. 75-185 - Lodge 76 v. Wisconsin Employment Commission

Dear John:

Please join me in your dissent.

Sincerely,

WHR

Mr. Justice Stevens

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 1, 1976

Re: 75-185 - Lodge No. 76 v. Wis. Employment Rels. Commission

Dear Bill:

In due course I shall circulate a dissent in the above case.

Sincerely,

John

Mr. Justice Brennan

Copies to the Conference

Pg. 1, 2, 4

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

From: Mr. Justice Stevens

Circulated: JUN 17 1976

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75–185

Lodge 76, International Association of Machinists and Aerospace Workers, AFL–CIO, et al., Petitioners, *v.* Wisconsin Employment Relations Commission et al.	On Writ of Certiorari to the Supreme Court of Wisconsin.

[June —, 1976]

MR. JUSTICE STEVENS, dissenting.

If the partial strike activity in this case were protected, or even arguably protected by § 7 of the National Labor Relations Act, the Court's conclusion would be supported by *San Diego Unions* v. *Garmon,* 359 U. S. 236. But in *Automobile Workers* v. *Wisconsin Board* (*Briggs-Stratton*), 336 U. S. 245, the Court rejected the argument that comparable activity was protected by § 7. And as I understand the Court's holding today, it assumes that this activity remains unprotected.[1] More-

[1] I recognize that there is some ambiguity in the Court's discussion, *ante,* at 20–21, which first implies that the employer may take any appropriate disciplinary action, including discharge, since the union activity is unprotected by § 7, and then immediately casts doubt on this assurance to the employer by indicating that some economic weapons may be used in reprisal even if the activity is protected. The ambiguity of the Court's rationale is inconsistent with its assumption that the employer is wholly free to use economic self-help without fear of committing an unfair labor practice. In all events, while I recognize that I may be misreading the Court's opinion, I assume that its holding rests on the predicate that this activity, like the partial strike activity in *Briggs-Stratton,* is unprotected by § 7.