The Burger Court Opinion Writing Database

NLRB v. Retail Store Employees

447 U.S. 607 (1980)

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 4, 1980

RE: 79-672 - N.L.R.B. v. Retail Store Employees, etc.

Dear Lewis:

I join.

Regards,

WEB

Mr. Justice Powell

Copies to the Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

April 28, 1980

RE: No. 79-672 N.L.R.B. v. Retail Store Employees Union, Local 1001, etc.

Dear Byron and Thurgood:

I'll undertake the dissent in the above.

Sincerely,

Bill

Mr. Justice White
Mr. Justice Marshall

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 28, 1980

RE: No. 79-672 N.L.R.B. v. Retail Store Employees, etc.

Dear Lewis:

I will be circulating a dissent in the above in due course.

Sincerely,

Mr. Justice Powell

cc: The Conference

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-672

National Labor Relations Board, Petitioner, *v.* Retail Store Employees Union, Local 1001, etc. | On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[June —, 1980]

MR. JUSTICE BRENNAN, dissenting.

NLRB v. *Fruit Packers*, 377 U. S. 58 (1964) (*Tree Fruits*), held that it was permissible under § 8 (b)(4)(ii)(B) of the National Labor Relations Act (NLRA) [1] for a union involved in a labor dispute with a primary employer to conduct peaceful picketing at a secondary site with the object of persuading consumers to boycott the primary employer's product. Today's decision stunts *Tree Fruits* by declaring that secondary site picketing is illegal when the primary employer's product at which it is aimed happens to be the only product which the secondary retailer distributes. I dissent.

The National Labor Relations Act does not place the secondary site off limits to all consumer picketing over the dispute with the primary employer. *Tree Fruits, supra,* at 63. The Act only forbids a labor union from picketing to "coerce" a secondary firm into joining the union's struggle against the primary employer. § 8 (b)(4)(ii)(B). But inasmuch as the secondary retailer is, by definition, at least partially dependent upon the sale of the primary employer's goods, the secondary firm will necessarily feel the pressure of labor activity pointed at the primary enterprise. Thus, the pivotal problem in sec-

[1] As amended by the Labor-Management Reporting and Disclosure Act of 1959 (Landrum-Griffin Act) § 704 (a), 73 Stat. 542-543, 29 U. S. C. § 158 (b)(4).

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: _____

Recirculated: [illegible] 17 1980

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-672

National Labor Relations Board, Petitioner, *v.* Retail Store Employees Union, Local 1001, etc. | On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[June —, 1980]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE WHITE and MR. JUSTICE MARSHALL join, dissenting.

NLRB v. *Fruit Packers*, 377 U. S. 58 (1964) (*Tree Fruits*), held that it was permissible under § 8 (b)(4)(ii)(B) of the National Labor Relations Act (NLRA) [1] for a union involved in a labor dispute with a primary employer to conduct peaceful picketing at a secondary site with the object of persuading consumers to boycott the primary employer's product. Today's decision stunts *Tree Fruits* by declaring that secondary site picketing is illegal when the primary employer's product at which it is aimed happens to be the only product which the secondary retailer distributes. I dissent.

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[1] As amended by the Labor-Management Reporting and Disclosure Act of 1959 (Landrum-Griffin Act) § 704 (a), 73 Stat. 542-543, 29 U. S. C. § 158 (b)(4).

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

CHAMBERS OF
JUSTICE POTTER STEWART

May 28, 1980

Re: No. 79-672, NLRB v. Retail Store Employees

Dear Lewis,

I am glad to join your opinion for the Court.

Sincerely yours,

P.S.

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States

Memorandum

----------, 19------

the United States
D. C. 20543

Lewis -

I think this

is fine.

P.S,

79-672
LFP to Conf
6/6/80

, 1980

ail Store Employees

THE CONFERENCE

Brennan's dissent, I am adding
the first citation in note 8,

with MR. JUSTICE BRENNAN's
l secondary product picketing
may have no greater effect upon a neutral than a legal primary boycott. Post, at 4. But when the neutral's business depends upon the products of a particular primary employer, secondary product picketing can produce injury almost identical to the harm resulting from an illegal secondary boycott. See generally Duerr, Developing a Standard for Secondary Consumer Picketing, 26 Lab. L.J. 585 (1975). Congress intended §8(b)(4)(ii)(B) to protect neutrals from that type of coercion. MR. JUSTICE BRENNAN's view that the legality of secondary picketing should depend upon whether the pickets "urge only a boycott of the primary employer's product," post, at 3, would provide little or no protection. No well-advised union would allow secondary pickets to carry placards urging anything other than a product boycott. Section 8(b)(4)(ii)(B) cannot bear a construction so inconsistent with the congressional intention to prevent neutrals from becoming innocent victims in contests between others."

L.F.P.

L.F.P.

ss

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 28, 1980

Re: 79-672 - National Labor Relations Board v. Retail Store Employees Union, Local 1001

Dear Lewis,

I'll await the dissent.

Sincerely yours,

Byron

Mr. Justice Powell

Copies to the Conference

cmc

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 5, 1980

Re: 79-672 - NLRB v. Retail Store Employees Union, Local 1001

Dear Bill,

Please join me in your dissent.

Sincerely yours,

Byron

Mr. Justice Brennan

Copies to the Conference

cmc

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 27, 1980

Re: No. 79-672 - NLRB v. Retail Store Employees Union, Local 1001, etc.

Dear Lewis:

I await the dissent.

Sincerely,

T.M.

Mr. Justice Powell

cc: The Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 5, 1980

Re: No. 79-672 - NLRB v. Retail Store Employees Union, Local 1001, etc.

Dear Bill:

Please join me in your dissent.

Sincerely,

T.M.

Mr. Justice Brennan

cc: The Conference

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

From: Mr. Justice Blackmun

Circulated: JUN 16 1980

Recirculated: _____

No. 79-672 - NLRB v. Retail Store Employees Union

MR. JUSTICE BLACKMUN, concurring.

I join Parts I and II of the Court's opinion, but not Part III. The Court's cursory discussion of what for me are difficult First Amendment issues presented by this case fails to take account of the effect of this Court's decision in Police Department of Chicago v. Mosley, 408 U.S. 92 (1972), on the question whether the National Labor Relations Act's content-based ban on peaceful picketing of secondary employers is constitutional. The failure to take Mosley into account is particularly ironic given that the Court today reaffirms and extends the principles of that case in Carey v. Brown, ante.

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

From: Mr. Justice Blackmun

Circulated: _____

Recirculated: JUN 17 1980

Printed

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-672

National Labor Relations Board, Petitioner, *v.* Retail Store Employees Union, Local 1001, etc.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[June —, 1980]

MR. JUSTICE BLACKMUN, concurring.

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In *NLRB* v. *Fruit Packers*, 377 U. S. 58, 76 (1964), Mr. Justice Black wrote a concurring opinion in which he concluded that § 8 (b)(4)(ii)(B) of the National Labor Relations Act "abridges freedom of speech and press in violation of the First Amendment." He said:

> "In short, we have neither a case in which picketing is banned because the picketers are asking others to do something unlawful nor a case in which *all* picketing is, for reasons of public order, banned. Instead, we have a case in which picketing, otherwise lawful, is banned only when the picketers express particular views. The result is an abridgement of the freedom of these picketers to tell a part of the public their side of a labor controversy,

LFP

4-5

5-27-80

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: MAY 27 1980

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-672

National Labor Relations Board, Petitioner, *v.* Retail Store Employees Union, Local 1001, etc.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[June —, 1980]

MR. JUSTICE POWELL delivered the opinion of the Court.

The question is whether § 8 (b)(4)(ii)(B) of the National Labor Relations Act, 29 U. S. C. § 158 (b)(4)(ii)(B), forbids secondary picketing against a struck product when such picketing predictably encourages consumers to boycott a neutral party's business.

I

Safeco Title Insurance Co. underwrites real estate title insurance in the State of Washington. It maintains close business relationships with five local title companies.[1] The companies search land titles, perform escrow services, and sell title insurance. Over 90% of their gross incomes derives from the sale of Safeco insurance. Safeco has substantial stockholdings in each title company, and at least one Safeco officer serves on each company's board of directors. Safeco, however, has no control over the companies' daily operations. It does not direct their personnel policies, and it never exchanges employees with them.

[1] The title companies are Land Title Company of Clark County, Land Title Company of Cowlitz County, Land Title Company of Kitsap County, Land Title Company of Pierce County, and Land Title Company of Snohomish County.

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 6, 1980

79-672: NLRB v. Retail Store Employees

MEMORANDUM TO THE CONFERENCE

In response to Bill Brennan's dissent, I am adding the following paragraph after the first citation in note 8, page 6:

"We do not disagree with MR. JUSTICE BRENNAN's dissenting view that successful secondary product picketing may have no greater effect upon a neutral than a legal primary boycott. Post, at 4. But when the neutral's business depends upon the products of a particular primary employer, secondary product picketing can produce injury almost identical to the harm resulting from an illegal secondary boycott. See generally Duerr, Developing a Standard for Secondary Consumer Picketing, 26 Lab. L.J. 585 (1975). Congress intended §8(b)(4)(ii)(B) to protect neutrals from that type of coercion. MR. JUSTICE BRENNAN's view that the legality of secondary picketing should depend upon whether the pickets "urge only a boycott of the primary employer's product," post, at 3, would provide little or no protection. No well-advised union would allow secondary pickets to carry placards urging anything other than a product boycott. Section 8(b)(4)(ii)(B) cannot bear a construction so inconsistent with the congressional intention to prevent neutrals from becoming innocent victims in contests between others."

L.F.P.

L.F.P.

ss

P. 6

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

6-9-80

Circulated: _____

Recirculated: JUN 10 1980

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-672

National Labor Relations Board, Petitioner, *v.* Retail Store Employees Union, Local 1001, etc.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[June —, 1980]

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 27, 1980

79-672
National Labor Relations Board
v.
Retail Store Employees Union

Dear Lewis:

Please join me.

Sincerely,

Mr. Justice Rehnquist

Copies to the Conference

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 10 '80

1st DRAFT Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 79-672

National Labor Relations Board, Petitioner, *v.* Retail Store Employees Union, Local 1001, etc.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[June —, 1980]

MR. JUSTICE STEVENS, concurring.

For the reasons stated by Mr. Justice Harlan and Mr. Justice Black in their separate opinions in *Tree Fruits,* 377 U. S. 58, 76, 80, I am persuaded that Congress intended to prohibit this secondary picketing, and for the reasons stated by MR. JUSTICE POWELL, I agree that this case is not governed by *Tree Fruits.* I therefore join Parts I and II of the Court's opinion.

The constitutional issue, however, is not quite as easy as the Court would make it seem because, as Mr. Justice Black pointed out in *Tree Fruits,* "we have a case in which picketing, otherwise lawful, is banned only when the picketers express particular views." *Id.*, at 79. In other words, this is another situation in which regulation of the means of expression is predicated squarely on its content. See *Consolidated Edison Co.* v. *Public Service Commission,* — U. S. —, — (STEVENS, J., concurring). I agree with the Court that this content-based restriction is permissible but not simply because it is in furtherance of objectives deemed unlawful by Congress. *Ante,* at 8. That a statute proscribes the otherwise lawful expression of views in a particular manner and at a particular location cannot in itself totally justify the restriction. Otherwise the First Amendment would place no limit on Congress' power. In my judgment, it is our responsibility to determine