The Burger Court Opinion Writing Database

Belknap, Inc. v. Hale

463 U.S. 491 (1983)

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

April 4, 1983

Re: No. 81-1966, Belknap, Inc. v. Hale

Dear Byron:

I join.

Regards,

WEB

Justice White

Copies to the Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 25, 1983

RE: No. 81-1966 Belknap, Inc. v. Hale

Dear Thurgood, Harry and Lewis:

If Byron circulates an opinion on the merits, (rejecting, Lewis, your suggestion of no final judgment) I'll be glad to undertake the dissent in this case.

Sincerely,

Bill

Justice Marshall
Justice Blackmun
Justice Powell

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 8, 1983

RE: No. 81-1966 Belknap, Inc. v. Hale

Dear Byron:

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

Sincerely,

Bill

Justice White

Copies to the Conference

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Brennan**

Circulated: 6/9/83

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81–1966

BELKNAP, INC., PETITIONER *v.*
DUWAINE E. HALE ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

[March ——, 1983]

JUSTICE BRENNAN, dissenting.

In some respects, this is a difficult case. Preemption cases in the labor law area are often difficult because we must decide the questions presented without any clear guidance from Congress. See *Motor Coach Employees* v. *Lockridge*, 403 U. S. 274, 286, 289 (1971); *San Diego Unions* v. *Garmon*, 359 U. S. 236, 240–242 (1959); *Garner* v. *Teamsters Union*, 346 U. S. 485, 488 (1953). We have developed standards to assist us in our task, see *e. g.*, *Machinists* v. *Wisconsin Emp. Rel. Comm'n*, 427 U. S. 132 (1976); *Garmon*, *supra*, but those standards are by necessity general ones which may not provide as much assistance as we would like in particular cases. This is especially true when the case is an unusual one. We are not confronted here with a suit between an employer and a union, see *e. g.*, *Sears, Roebuck & Co.* v. *Carpenters*, 436 U. S. 180 (1978); *Machinists*, *supra*; *Garmon*, *supra*, or with one between a union and one of its members, see *e. g.*, *Farmer* v. *Carpenters*, 430 U. S. 290 (1977); *Lockridge*, *supra*; *Plumbers' Union* v. *Borden*, 373 U. S. 690 (1963). Such suits are common and have provided the vehicles for developing the standards we have established in this area. Rather, we have here a suit brought by former employees of petitioner who allegedly were hired as permanent replacements for striking union members. Our prior cases,

1-2, 8-10, 16-19

Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Brennan**

Circulated: 6/16/83

Recirculated: _____

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81–1966

BELKNAP, INC., PETITIONER *v.*
DUWAINE E. HALE ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

[June ——, 1983]

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE POWELL join, dissenting.

In some respects, this is a difficult case. Preemption cases in the labor law area are often difficult because we must decide the questions presented without any clear guidance from Congress. See *Motor Coach Employees* v. *Lockridge*, 403 U. S. 274, 286, 289 (1971); *San Diego Unions* v. *Garmon*, 359 U. S. 236, 240–242 (1959); *Garner* v. *Teamsters Union*, 346 U. S. 485, 488 (1953). We have developed standards to assist us in our task, see *e. g.*, *Machinists* v. *Wisconsin Emp. Rel. Comm'n*, 427 U. S. 132 (1976); *Garmon, supra*, but those standards are by necessity general ones which may not provide as much assistance as we would like in particular cases. This is especially true when the case is an unusual one. We are not confronted here with a suit between an employer and a union, see *e. g.*, *Sears, Roebuck & Co.* v. *Carpenters*, 436 U. S. 180 (1978); *Machinists, supra*; *Garmon, supra*, or with one between a union and one of its members, see *e. g.*, *Farmer* v. *Carpenters*, 430 U. S. 290 (1977); *Lockridge, supra*; *Plumbers' Union* v. *Borden*, 373 U. S. 690 (1963). Such suits are common and have provided the vehicles for developing the standards we have established in this area. Rather, we have here a suit brought by former employees of petitioner who allegedly were hired as permanent

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

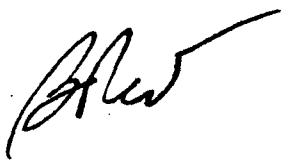
CHAMBERS OF
JUSTICE BYRON R. WHITE

January 21, 1983

Memorandum to the Conference

Re: 81-1966: Belknap v. Hale

I passed on this case at the last conference. My vote, still somewhat tentative, is to affirm at least to the extent of letting the fraud action go forward in the state court. The contract action is a more doubtful proposition. In any event, I do not agree with the submission of the Solicitor General on behalf of the Board.



To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

Circulated: MAR 4 1983

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1966

BELKNAP, INC., PETITIONER *v.*
DUWAINE E. HALE ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

[March ——, 1983]

JUSTICE WHITE delivered the opinion of the Court.

The federal labor relations laws recognize both economic strikes and strikes to protest unfair labor practices. Where employees have engaged in an economic strike, the employer may hire permanent replacements whom he need not discharge even if the strikers offer to return to work unconditionally. If the work stoppage is an unfair labor practice strike, the employer must discharge any replacements in order to accommodate returning strikers. In this case we must decide whether the National Labor Relations Act (the NLRA or the Act) preempts an action under state law for misrepresentation and breach of contract brought by strike replacements who were displaced by reinstated strikers after having been offered and accepted a job on a permanent basis and assured they would not be fired to accommodate a returning striker.

I

Petitioner Belknap, Inc., is a corporation engaged in the sale of hardware products and certain building materials. A bargaining unit consisting of all of Belknap's warehouse and maintenance employees selected International Brotherhood of Teamsters Local No. 89 (Union) as their collective bargaining representative. In 1975, the Union and Belknap entered

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

March 11, 1983

Re: 81-1966 - Belknap v. Hale

Dear Sandra,

Thank you for your letter of March 5 expressing your doubts about the finality of the judgment of the Kentucky Court of Appeals. I am sorry not to have responded earlier, but I have been away.

I agree that we should be satisfied about our jurisdiction to proceed even though the parties have not questioned it. I am quite satisfied, however, that it would be consistent with our prior cases to consider the judgment of the Kentucky court to be final within the meaning of 28 U.S.C. §1257.

In Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975), we described four categories of cases in which state court judgments have been held final even though there were further proceedings to be had in the state courts. The fourth category was described as follows:

> Lastly, there are those situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. In these circumstances, if a refusal immediately to review the state-court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation.

Construction Laborers v. Curry, 371 U.S. 542 (1963), Mercantile National Bank v. Langdeau, 371 U.S. 555 (1963), and Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), were cases in this category.

The holding in Curry was described as follows:

> In Construction Laborers v. Curry, 371 U.S. 542 (1963), the state courts temporarily enjoined labor union picketing over claims that the National Labor Relations Board had exclusive jurisdiction of the controversy. The Court took jurisdiction for two independent reasons. First, the power of the state court to proceed in the face of the pre-emption claim was deemed an issue separable from the merits and ripe for review in this Court, particularly "when postponing review would seriously erode the national labor policy requiring the subject matter of respondents' cause to be heard by the...Board, not by the state courts." Id., at 550. Second, the Court was convinced that in any event the union had no defense to the entry of a permanent injunction other than the pre-emption claim that had already been ruled on in the state courts. Hence the case was for all practical purposes concluded in the state tribunals.

It seems to me that the judgment in the case now before us is reviewable under the first of the independent grounds for holding the judgment in Curry to have been final. The company's claim in the state trial court was that the action was pre-empted because the conduct at issue was arguably an unfair labor practice under one or more sections of the federal law. That claim was sustained in the trial court but rejected in the Kentucky Court of Appeals on the ground that the company's activities were not unfair labor practices and that in any event the misrepresentation and contract claims were deeply rooted in local law and of only peripheral concern to the national labor policy.

Under Curry, we are not powerless to decide whether the state court was right or wrong. If the state court was wrong in rejecting the pre-emption claim, it would be inconsistent with our pre-emption cases and would seriously erode federal policy if the state proceeding were to go forward. Hence, the judgment here, when certiorari was granted, would appear to have been as final as it was in Curry. Of course, if the state court was correct, once that decision is made, the state suit could

proceed. It could also then be said that the judgment was not final after all and that we therefore have no jurisdiction. But to arrive at that bottom line, the merits of the pre-emption claims must be decided; the jurisdictional issue is inseparable from the merits, and I would not be averse to noting this fact. However the matter is put, we have jurisdiction to hold that the Kentucky court's judgment on the pre-emption issue was correct.

Sincerely,

Justice O'Connor
Copies to the Conference
cpm

To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

p. 6 and stylistic changes throughout

Circulated: _____

Recirculated: MAR 29 1983

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1966

BELKNAP, INC., PETITIONER *v.*
DUWAINE E. HALE ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

[March ——, 1983]

JUSTICE WHITE delivered the opinion of the Court.

The federal labor relations laws recognize both economic strikes and strikes to protest unfair labor practices. Where employees have engaged in an economic strike, the employer may hire permanent replacements whom he need not discharge even if the strikers offer to return to work unconditionally. If the work stoppage is an unfair labor practice strike, the employer must discharge any replacements in order to accommodate returning strikers. In this case we must decide whether the National Labor Relations Act (the NLRA or the Act) preempts an action under state law for misrepresentation and breach of contract brought by strike replacements who were displaced by reinstated strikers after having been offered and accepted a job on a permanent basis and assured they would not be fired to accommodate a returning striker.

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Petitioner Belknap, Inc., is a corporation engaged in the sale of hardware products and certain building materials. A bargaining unit consisting of all of Belknap's warehouse and maintenance employees selected International Brotherhood of Teamsters Local No. 89 (Union) as their collective bargaining representative. In 1975, the Union and Belknap entered

To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 6

Circulated: MAR 31 1983

Recirculated: _____

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81–1966

BELKNAP, INC., PETITIONER *v.*
DUWAINE E. HALE ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

[March ——, 1983]

JUSTICE WHITE delivered the opinion of the Court.

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pp. 1, 5, 8-9, 10-14, 15-16
and stylistic changes

To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

Circulated: _____

Recirculated: 6/14/83

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1966

BELKNAP, INC., PETITIONER *v.*
DUWAINE E. HALE ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

[June ——, 1983]

JUSTICE WHITE delivered the opinion of the Court.

The federal labor relations laws recognize both economic strikes and strikes to protest unfair labor practices. Where employees have engaged in an economic strike, the employer may hire permanent replacements whom it need not discharge even if the strikers offer to return to work unconditionally. If the work stoppage is an unfair labor practice strike, the employer must discharge any replacements in order to accommodate returning strikers. In this case we must decide whether the National Labor Relations Act (the NLRA or the Act) preempts a misrepresentation and breach-of-contract action against the employer brought in state court by strike replacements who were displaced by reinstated strikers after having been offered and accepted a job on a permanent basis and assured they would not be fired to accommodate a returning striker.

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Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

Circulated: _____

Recirculated: JUN 24 1983

9, 12-14

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81–1966

BELKNAP, INC., PETITIONER *v.*
DUWAINE E. HALE ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

[June ——, 1983]

JUSTICE WHITE delivered the opinion of the Court.

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STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 16-17

To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

Circulated: _____

Recirculated: JUN 27 1983

6th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1966

BELKNAP, INC., PETITIONER *v.*
DUWAINE E. HALE ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

[June ——, 1983]

JUSTICE WHITE delivered the opinion of the Court.

The federal labor relations laws recognize both economic strikes and strikes to protest unfair labor practices. Where employees have engaged in an economic strike, the employer may hire permanent replacements whom it need not discharge even if the strikers offer to return to work unconditionally. If the work stoppage is an unfair labor practice strike, the employer must discharge any replacements in order to accommodate returning strikers. In this case we must decide whether the National Labor Relations Act (the NLRA or the Act) preempts a misrepresentation and breach-of-contract action against the employer brought in state court by strike replacements who were displaced by reinstated strikers after having been offered and accepted jobs on a permanent basis and assured they would not be fired to accommodate returning strikers.

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 28, 1983

Re: 81-1966 - Belknap v. Hale

81-431 - Guardians Association v. Civil Service Commission of the City of New York

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Dear Chief,

This will confirm that as far as I am concerned these cases could be announced this week.

Sincerely,

Byron

The Chief Justice

Copies to the Conference

cpm

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 9, 1983

Re: No. 81-1966-Belknap v. Hale

Dear Bill:

Please join me.

Sincerely,

T.M.

Justice Brennan

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 14, 1983

Re: No. 81-1966 - Belknap, Inc. v. Hale

Dear Byron:

This case continues to trouble me, just as it did at the time of conference. For now, I shall wait to see the dissent and any additional writings that may appear. I am frank to say, however, that I am now leaning toward voting to affirm.

Sincerely,

Harry

Justice White

cc: The Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Blackmun**

Circulated: JUN 21 1983

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81–1966

BELKNAP, INC., PETITIONER *v.*
DUWAINE E. HALE ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

[June ——, 1983]

JUSTICE BLACKMUN, concurring in the judgment.

I

Earlier this month, the Court unanimously reaffirmed the principle that the National Labor Relations Board's construction of the National Labor Relations Act (NLRA), if reasonable, is entitled to deference from the courts. *NLRB* v. *Transportation Management, Inc.*, —— U. S. ——, —— (1983) (slip op. 9). The Court today, it seems to me, ignores this fundamental premise of federal labor law in order to conform the substance of the NLRA to the contract and tort laws of the Commonwealth of Kentucky. Having done so, the Court not surprisingly concludes that those state laws are not pre-empted by the refashioned NLRA. I cannot participate in this extraordinary approach to labor law pre-emption.

The Court recognizes that, "as the Board interprets the law, the employer must reinstate strikers at the conclusion of even a purely economic strike unless it has hired 'permanent' replacements, that is, hired in a manner that would 'show that the men [and women] who replaced the strikers were regarded by themselves and the [employer] as having received their jobs on a permanent basis.'" *Ante*, at 9, quoting *Georgia Highway Express, Inc.*, 165 N. L. R. B. 514, 516 (1967), aff'd, *sub nom. Truck Drivers and Helpers Local 728* v.

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Blackmun**

Circulated: _____

Recirculated: JUN 27 1983

Pages: 2, 3-4, 6
Footnotes Renumbered

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1966

BELKNAP, INC., PETITIONER *v.*
DUWAINE E. HALE ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

[June ——, 1983]

JUSTICE BLACKMUN, concurring in the judgment.

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

January 24, 1983

81-1966 Balknap v. Hale

Dear Chief:

Byron's note of January 21 prompted me to take another look at this case.

At Conference my vote was very tentatively to reverse - thinking that Garmon and its progeny probably supported preemption. I thought Byron expressed essentially the same view at Conference, although he was concerned - as all of us were - by the allegations of fraud by the employer.

John Stevens' first vote was to dismiss for want of a final judgment. My notes are not entirely clear, but I believe John was relying on the fact that the case has not been tried. He commented that the allegations of fraud were broad enough to include more than the newspaper advertisement.

In any event, I share the view expressed by several of us at Conference that we made a mistake in taking this case, and my first vote now is to dimiss for want of a final judgment. I am still not at rest as to my second vote, though I continue to lean tentatively toward reversal.

My judgment is that this is a case our Court could well avoid deciding, at least on the record before us.

Sincerely,

Lewis

The Chief Justice

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 8, 1983

81-1966 Belknap, Inc. v. Hale

Dear Byron:

I will await Bill Brennan's dissent.

Sincerely,

Lewis

Justice White

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 13, 1983

81-1966 Belknap v. Hale

Dear Bill:

Please join me in your dissent.

Sincerely,

Lewis

Justice Brennan

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 7, 1983

Re: No. 81-1966 Belknap, Inc. v. Hale

Dear Byron:

Please join me.

I would feel more comfortable if you would add at the end of the first sentence in footnote 8 on page 15 the words "entitled to reinstatement." This qualification may be implied from the language of the text, but sometimes footnotes can develop a life of their own.

Sincerely,

Justice White

cc: The Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 7, 1983

Re: 81-1966 - Belknap v. Hale

Dear Byron:

Although I agree with the analysis in your opinion, I am still troubled by the jurisdictional question. Under both your reasoning and that of the Kentucky Court of Appeals, further proceedings must be had in the state courts. Does it not follow that the state court judgment under review is not "final"? Or is a state court judgment "final" for jurisdictional purposes whenever it rejects the only federal claim--or federal defense--on which the petitioner relies? It is only because I question whether the finality concept is that open-ended that I am not yet prepared to join your opinion.

Respectfully,

Justice White

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 15, 1983

Re: 81-1966 - Belknap v. Hale

Dear Byron:

After vacillating somewhat on the jurisdictional issue in this case, I have finally come to the conclusion that whenever the highest court of a State rejects a federal preemption argument that would have disposed of the case if it had been upheld, we should treat the state court judgment as final under Curry and Cox. I therefore am inclined to favor the second of the two suggestions made in Sandra's letter of March 11. I do agree with her, however, that there is sufficient importance to the issue that you ought to explain it in your opinion.

Respectfully,

John

Justice White

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 30, 1983

Re: 81-1966 - Belknap v. Hale

Dear Byron:

Please join me.

Respectfully,

Justice White

Copies to the Conference

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

March 5, 1983

Re: Belknap v. Hale, No. 81-1966

Dear Byron,

Your opinion is very well written and persuasive. The question I have is whether, in light of your analysis of the merits, there is a final judgment under 28 U.S.C. §1257 which would give us jurisdiction to review it.

In Construction Laborers v. Curry, 371 U.S. 542 (1963), we took jurisdiction over a case where the state court had temporarily enjoined labor union picketing and the labor union argued that the NLRB had exclusive jurisdiction of the controversy. We based our authority to review the case on two grounds. First, we found that in granting the temporary injunction, the state court had "finally and erroneously assert[ed] its jurisdiction to deal with a controversy which is beyond its power and instead is within the exclusive domain of the National Labor Relations Board." Id., at 548. Second, we concluded that the case was effectively concluded in the state courts because although only a temporary injunction was issued, the union conceded that it "had no further factual or legal issues to present" to the state court apart from the preemption claim that had already been determined. Id., at 551.

My initial impression is that Curry militates against our finding authority to review this case. We clearly decided the merits of the preemption issue in Curry and then found that because the state court had exceeded its jurisdiction in issuing the temporary injunction, we could review the case. In the present situation, the claims are not preempted, and it would seem that this conclusion compels our finding that the case is beyond our appellate jurisdiction. I confess that this approach is troublesome because it requires an extensive review of the merits as a prelude to dismissal of the case. Nevertheless, that approach appears to be required by Curry.

As to the second ground in Curry, it seems that in the present case, we cannot say that "there is nothing more of substance to be decided in the trial court." Ibid. Since the state court did not even issue an injunction in this case, and the controversy waits at the very threshold of

adjudication, it is entirely possible that the state courts might resolve the issue in a way that would obviate the necessity to decide the federal issue.

Although I am not yet certain that this case must be dismissed under Curry if the Court finds both claims to be preempted, I think that it may be necessary to address the Curry problem. It may perhaps be possible to read Curry as holding that we have authority to review a case involving interlocutory action whenever a state court decides a preemption issue because of the possible effects on national labor policy. I have difficulties with this solution because it does not fit comfortably with the language in Curry, which ostensibly makes our authority to review dependent on whether the state court decided the preemption issue correctly. In addition, this solution further expands our jurisdiction under §1257.

I am interested in your thoughts on this matter.

Sincerely,

Sandra

Justice White

Copies to the Conference

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

March 11, 1983

No. 81-1966 - Belknap v. Hale

Dear Byron,

I do not dispute our power to decide whether the state court was right or wrong on the merits of the preemption issue. We certainly have jurisdiction to determine whether we have jurisdiction to decide a case. Nevertheless, it appears that under Curry, the result of our inquiry into the merits of the preemption issue dictates whether the judgment below is final. In Curry, we thought that postponing review would seriously erode the national labor policy because the subject matter of the suit was required to be heard by the NLRB, and not the state courts. Our explanation of Curry in Cox Broadcasting Company v. Cohn, 420 U.S. 469 is completely consistent with Curry; in Cox, we described the fourth category of final judgments as involving state court decisions that required immediate review to prevent the erosion of federal policy. As your analysis in the Belknap draft demonstrates, the state court action below does not threaten such erosion.

My concern with the draft is its failure to deal with the Curry problem of the relationship between the jurisdictional issue and the analysis on the merits. I tend to think we must do one of two things: either dismiss the case for want of jurisdiction after explaining why, or modify Curry by holding that whenever a preemption issue is raised and decided in the state court, this Court has jurisdiction irrespective of whether the decision below was right or wrong. I tend to prefer the former solution.

Sincerely,

Sandra

Justice White

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

April 13, 1983

No. 81-1966 Belknap, Inc. v. Hale

Dear Byron,

Please join me.

Sincerely,

Sandra

Justice White

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