IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

Nos. 27, 34 + 47

TRANSCRIPT OF PROCEEDINGS

In the Matter of: AMERICAN FEDERATION OF LABOR, ARIZONA STATE FEDERATION OF LABOR, PHOENIX BUILDING AND CONSTRUCTION TRADES COUNCIL, et al.,

Appellants

vs.

AMERICAN SASH & DOOR COMPANY, D. A. BREWER W. B. STEVENS, et al.,

Appellees,

Date: November 8, 1948

(pt. 1)

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AMERICAN FEDERATION OF LABOR, ARIZONA STATE FEDERATION OF LABOR, PHOENIX BUILDING AND CONSTRUCTION TRADES COUNCIL, ET AL, Appellants, vs. AMERICAN SASH & DOOR COMPANY, D. A. BREWER, W. B. STEVENS, ET AL, Appellees.	Case No. 27
LINCOLN FEDERAL LABOR UNION NO. 19129, AMERICAN FEDERATION OF LABOR, NEBRASKA STATE FEDERATION OF LABOR, ET AL, Appellants, vs. NORTHWESTERN IRON AND METAL COMPANY, DAN GIEBELHOUSE, STATE OF NEBRASKA AND NEBRASKA SMALL BUSINESS MEN'S ASSOCIATION, Appellees.	Case No. 47
GEORGE WHITAKER, A. M. DEBRUHL, T. G. EMBLER, ET AL, Appellants, vs. STATE OF NORTH CAROLINA, Appellees.	Case No. 34

Washington, D. C.

Monday, November 8, 1948.

The above-entitled cause came on for oral argument at 3:45 o'clock p.m.

BEFORE:

Associate Justice Black (presiding) and Associate Justices Reed, Frankfurter, Douglas, Jackson, Rutledge, and Burton.

APPEARANCES:

For the Appellants:

Herbert S. Thatcher,
George Pennell,
H. S. McCluskey.

For the Appellees:

Donald R. Richberg.

P R O C E E D I N G S

Mr. Justice Black: Number 27, American Federation of Labor, et al, against American Sash & Door Company, et al; Number 47, Lincoln Federal Labor Union No. 19129, American Federation of Labor, et al, against Northwestern Iron and Metal Company, et al; and Number 34, George Whitaker, et al, against State of North Carolina.

The Clerk: Counsel are present, sir.

Mr. Justice Black: How are the three cases to be presented?

Mr. Thatcher: Your Honor, we are presenting the arguments in the three cases as if they were one. We will complete our arguments in all three cases affirmatively before the opposition presents its argument in all three cases negatively.

Mr. Justice Black: How many counsel will present argument?

Mr. Thatcher: We have three counsel appearing, Your Honor, who will argue. They are Mr. Pennell of North Carolina Mr. McCluskey from Arizona, and myself.

Mr. Richberg: If it please the Court, so that there will be no misunderstanding, we intend to argue the cases consecutively but not all in one argument. I expect to argue the case for Arizona and then North Carolina and then Nebraska.

ORAL ARGUMENT OF HERBERT S. THATCHER
ON BEHALF OF APPELLANTS

Mr. Thatcher: The legal issues in all three cases, Your Honor, are all but identical, and when we present our whole argument it applies to all three.

In these three cases, Your Honor, Numbers 27, 47, and 34, the principal issue is the constitutionality of State laws -- involving in two cases constitutional amendments and in the third case, that of North Carolina, the statutes -- as to any form of union security agreement or arrangement; that is, covering closed shop, union shop, or maintenance of membership contracts or arrangements, or other arrangements between employers and unions, whereby any person shall be required as a condition of employment to maintain membership in, to become or remain a member of, a labor organization.

Two of the cases, Arizona and Nebraska, arise under complaints to obtain specific performance of union shop agreements in those States. In Arizona, in addition, the Attorney General and the State officials are sought to be enjoined from enforcing the law.

In the third case, North Carolina, and appellants, George Whitaker, a building contractor, A. M. Debruhl, an officer of a union, and a number of other union officials, have been indicted and found guilty of violating the criminal law of this State and have been fined and are here on appeal.

Thus, the Arizona and Nebraska cases are here on the

pleadings, and the North Carolina case is here after a trial by jury and a finding of guilty.

The specific facts as disclosed by those pleadings and by the record of the North Carolina case, the specific facts in each of the cases, are as follows: In Arizona, the law in question, which is a constitutional amendment adopted by a close majority several years ago, is set forth on page 4 of our brief.

Mr. Justice Black: In which case?

Mr. Thatcher: We have filed, Your Honor, one brief in all three cases, with permission of the parties.

Thatis, page 4 of our brief. It, as Your Honors will observe, states first that:

> "No person shall be denied the opportunity to obtain or retain employment because of non-membership in a labor organization* * *"

Note that: "non-membership in a labor organization."

> "nor shall the State or any subdivision thereof, or any corporation, individual or association of any kind enter into any agreement, written or oral, which excludes any person from employment or continuation of employment because of non-membership in a labor organization."

Prior to the adoption of thisamendment, the appellant, Carpenters Local Union No. 2093, the Carpenters Local Union in Phoenix, which then represented all of the employees in

the bargaining unit, entered into a union shop contract with the appellee, American Sash & Door Company, which contract required that membership by employees be maintained as a condition of employment.

This employer was engaged in interstate commerce.

Also, before the adoption of theamendment, a similar contract was entered into between the appellant, Phoenix Building and Construction Trades Council, and appellee, D.A. Brewer, an employer engaged in intrastate commerce.

At a date subsequent to the effective date of the amendment in question, one employee in each of these two shops wilfully defaulted in the payment of their dues, were suspended from the union, and their discharge was requested as provided by the contract of the employer. The employer in each case refused, claiming that the constitutional amendment had intervened and had prevented him from complying with the contract as written.

Subsequent to the amendment, the appellant, Local Union 2093, the Carpenters Union which we have here, and an employee by the name of Ralph Henley in Phoenix entered into a similar agreement requiring membership of the employees as a condition of employment. This member likewise wilfully defaulted in his dues, lost his membership, and his discharge was requested. The employer thereupon expressed his full willingness to comply with the agreement, but stated that he was fearful of conse-

quences under the State law, had been threatened by the Attorney General, and therefore he would refuse to comply with the contract as written. He was a complainant in a case under the declaratory judgment statute as to his rights and duties under the contract.

Mr. Justice Black: Which one is that?

Mr. Thatcher: That is the appellant, Ralph Henley.

Mr. Justice Black: In which case?

Mr. Thatcher: All of these are in the Arizona case. There are four factual situations in the Arizona case. In two, the contracts were entered into prior to the passage of the amendment. In another case, the contract was entered into after the amendment became effective. There the employer is also plaintiff. In a third situation, the appellant involved the Arizona State Federation of Labor, which in the State of Arizona operates a union newspaper which is sold to union members throughout the State. As was customary in its business, it employed only union members. After all, it was propagandizing in favor of spreading organization and, consistent with its policy, employed for years, traditionally, only union members.

Subsequent to the amendment, it refused employment -- there was no contract involved here -- to one or more applicants for employment, because those applicants were not members of some printing trades union. The State threatened

prosecution; and that is one of the bases for our complaint against the Attorney General, and asking that he be enjoined from enforcing the law.

The pleadings also show that the Attorney General made similar threats throughout the State; that is, to enforce the amendment in question by criminal and civil prosecutions. As a matter of fact, the complaint is very much the same as was before this Court in A. F. of L. versus Watson, the Florida case, which the Court sent back to Florida for a definitive pronouncement by that State as to the scope and meaning and application of the Florida constitutional amendment outlawing closed shops; A. F. of L. versus Watson, several years ago. The allegations as to irreparable injury and as to the consequences of the enforcement, and so on, are the same in this complaint as they were in that complaint, which the Court found sufficient.

Mr. Justice Black: Are you drawing a distinction between the contracts that were made before the act and the contracts that were made after the act?

Mr. Thatcher: There is a different constitutional provision of the law with respect to those invoked before -- that is, the contract clause -- but the basis for the States' outlawing contracts entered prior to the amendment is much the same as with respect to those entered into subsequent. We do not draw any sharp distinction between the power of the

States to outlaw previously entered into contracts or subsequently entered into contracts.

Mr. Justice Reed: These were all declaratory judgments?

Mr. Thatcher: Yes, Your Honor; still talking about the Arizona case.

Mr. Justice Frankfurter: As tohis question, is this just one action, in the Arizona courts?

Mr. Thatcher: Just one action, primarily declaratory judgment.

Mr. Justice Frankfurter: Different parties plaintiff, which, so far as we are concerned, were treated as a single litigation by the Arizona court?

Mr. Thatcher: That is true, Your Honor. It involves also a requirement for specific performance on the two contracts where the employer refused to live up to the contract and we asked that he be obliged to live up to it. So we have that additional element.

Mr. Justice Reed: You ask not only the declaration but also the carrying out?

Mr. Thatcher: Also the carrying out of the contract, and also the injunction against the Attorney General as to enforcing the law with respect to these particular appellants.

Mr. Justice Reed: Those are the remedies which would follow from the declaratory judgment?

Mr. Thatcher: That is correct, Your Honor.

Now, a motion to dismiss, or something equivalent to a motion to dismiss, was filed by the opposing parties below, in the Trial Court in Arizona. They were sustained by the Trial Court, and appeal was had then on the pleadings to the State Supreme Court.

The State Supreme Court affirmed the Trial Court's dismissal of the complaint on appellee's motion; that is, the motion of the defendants below to dismiss -- and passed on the case on its merits, completely on its merits, holding the law constitutional as against every Federal question that we raised.

Each of those Federal questions was discussed by the
3 court and rejected.

So we have here a final definitive pronouncement by the State Supreme Court: first, that any contract entered into prior or subsequent to the law is not enforceable in that State; second, that even though we do not have a contract, even though we merely have an employer who seeks, as part of his business, to employ only union members, that employer can not do so, contract or no contract; and, third, we have an implied admission, at least, that the Attorney General may enforce these laws, or this amendment, by civil or criminal prosecutions.

The court placed its dismissal of the complaint solely on the basis that the amendment in question did not contravene either the Federal or the State constitution. Of course,

being a constitutional amendment, it could not very well contravene the State's constitution.

That is the Arizona case.

Mr. Justice Black: Before you leave it, what is your contention as to what constitutional provision was violated?

Mr. Thatcher: There were three, Your Honor. I will come to that in more detail, but there were three; the Fourteenth Amendment, the First Amendment, and the contract clause. I will discuss the three later.

Mr. Justice Reed: There was nothing affecting commerce between the States in any instance?

Mr. Thatcher: There was in two cases. In two of the situations there were employers engaged in interstate commerce, as shown by the pleadings. And we had, at the time of the filing of the complaint and at the time of the argument before the Trial Court, argued conflict with the National Labor Relations Act; but there has intervened the Taft-Hartley Act, which specifically states, in effect, that the States shall be free to pass laws as they desire concerning the union security relationship.

So we, for the time being, have dropped the contention that there is any conflict with the Wagner Act; and that is not before the Court at this time.

Mr. Justice Black: In none of the cases?

Mr. Thatcher: In none of the cases.

All right. That is the Arizona case.

In the Nebraska case, the situation is as follows:

That also is a declaratory judgment plus an action for specific performance. There, the pleadings show as follows: The employees of the appellee -- there is only one employer here, Northwestern Iron and Metal Company of Lincoln, Nebraska -- had unanimously selected the appellant, Lincoln Federal Labor Union, A. F. of L., as their bargaining representative; and those same employees had unanimously authorized that union to enter into a union security all-union agreement with that employer. Pursuant to that authorization, the employer, at a time prior to the amendment, entered into a contract with the appellant local union requiring all of its employees to maintain their membership in the union.

Subsequent to the amendment, one of the employees, the appellee Dan Giebelhouse -- we named him as a party defendant there -- wilfully defaulted on his dues, as happened in the Arizona case; and the employer was asked, pursuant to the contract, to discharge Giebelhouse. The employer refused, claiming that the amendment prevented him from living up to the contract.

He did not deny that but for the amendment he should and would have lived up to the contract.

Mr. Justice Black: You have a straight violation of law; and there is raised a question of the constitutionality.

Mr. Thatcher: That is right. It is a very clear-cut, clean case, there. As I said, this was a declaratory judgment case plus an action for specific performance.

Thereafter, as in the Arizona case, the motion filed below was denied, and the matter was taken to the Supreme Court, which passed on all of the Federal issues involved directly, specifically denying all our contentions under the Federal constitution and upholding the dismissal to the complaint, on the ground, the sole ground, that the amendment was constitutional and therefore the complaint stated no cause of action. Now, that is Nebraska.

Mr. Justice Reed: Was that a declaratory judgment?

Mr. Thatcher: That was a declaratory judgment coupled with a request for specific performance.

Mr. Justice Reed: I thought there was a violation of the Act.

Mr. Thatcher: There was a violation of the contract by the employer. The employee did maintain his membership, as he should have, and the employer did not thereupon discharge him, as he should have under the contract.

Mr. Justice Reed: And the declaratory judgment?

Mr. Thatcher: The declaratory judgment was brought to determine our rights under the contract, and as to the employer, his rights under the contract; and we named the Attorney General of the State, because the constitutionality of the

State amendment was involved.

Mr. Justice Reed: Was there any element of criminal prosecution in this case?

Mr. Thatcher: This case does not involve, as did the Arizona case, the threat of criminal prosecution.

In the North Carolina case, we have a straight statute passed by the legislature of North Carolina which makes it a restraint of trade, conspiracy to maintain a monopoly, for any party to enter into such a contract. The statute there is set forth on page 5 of our brief.

By the way, the Nebraska amendment is set forth on page 4.

This is similar to that of Arizona, in all except a major respect which Mr. McCluskey will deal with.

The North Carolina case, as Your Honors can see, is a straight criminal statute making it a crime for parties merely to enter into an agreement. The mere making of an agreement is deemed a restraint of trade or a conspiracy to create a monopoly.

Your Honors might question why this is a criminal statute, in that no criminal sanctions are directly set forth in the statute. We raised that same question to the North Carolina Supreme Court. Mr. Pennell will explain that in his presentation; but, briefly, the Supreme Court has held that under common law any activity declared against common policy

was punishable as a misdemeanor, with punishment up to two years imprisonment, or a fine, in the discretion of the court.

Mr. Justice Black: What does that have to do with the constitutional question?

Mr. Thatcher: Nothing, except that here we have an outlawing of the closed shop by a specific criminal statute. In the other cases, there is a constitutional amendment, which may or may not involve criminal statutes.

Mr. Justice Black: So you have here the single question as to whether the State has outlawed the closed shop?

Mr. Thatcher: That is the single question and the only question; whether it does it by criminal statute, by constitutional amendment, or by civil statute.

Mr. Justice Reed: And how about industries not affecting interstate commerce?

Mr. Thatcher: Well, under our due process argument, the industries are affected in interstate as well as --

Mr. Justice Reed: The Constitution may apply. The Fourteenth Amendment may apply. But does the commerce clause? Does every one of these cases involve actions by local employers who are engaged in or affected by interstate commerce?

Mr. Thatcher: The commerce clause is not involved in this proceeding here at all.

Mr. Justice Reed: It is all a question of due process?

Mr. Thatcher: Due process; the first amendment; the contract clause.

In the North Carolina case, to go on with the facts, the appellant Whitaker, who was a building contractor in Nashville, North Carolina, and various building trades unions in that city, entered into the usual closed shop contract that they had been entering into for years, under which the contractor agreed to employ only union craftsmen on his building construction in the city. Thereafter, the appellant Whitaker and the officers of the local unions were served with warrants, which alleged that they had violated the statute in question by merely making the contract. There was no allegation or complaint that any individual had lost a job or was complaining concerning the contract. It was the mere making of the contract in that case that was deemed a conspiracy to restrain trade and to create a monopoly.

Mr. Justice Black: Well, does that violate the Act?

Mr. Thatcher: That violates the Act.

Mr. Justice Black: There was no significance about that?

Mr. Thatcher: No significance about that at all. It was just merely the form in which the question arose.

It went to a jury hearing, and the jury found the appellants guilty. The defendants made the usual motions, raising all constitutional issues. Those motions were denied.

The case was carried to the State Supreme Court, which again passed on all Federal questions presented to it directly and denied the contentions made by appellants in respect to the Federal Constitution.

Now, before stating our general theories on constitutionality here, I would like to make this very emphatic beginning: We are not asserting in any way that unions have powers equivalent to government. In our brief we made an analogy between the function that a union performs in this smaller economic unit, of a plant or a shop, and in respect to the employees in that shop -- an analogy between that function and the function performed by a government in a political society, as to the citizens in that unit. That was presented merely as showing why there would be some justification for requiring all within the political unit to participate in the government and share in the costs, and, in the case of the labor organizations, to join those organizations. We did not thereby imply or mean to imply or intend to imply that unions are "government," in any sense of the word whatsoever; or that they are in any sense of the word a supergovernment; or that they are not subject to control, reasonable control, by the State -- if, thereby, basic constitutional rights are not invaded.

We further do not want to leave any impression, in our brief, and by our arguments, that we deem it as a right of the

union to compel membership as such. We do not ask for any law requiring closed shop conditions. We merely ask for the right to enter into agreements for unions representing a majority -- and we premise it on a majority always -- of employees; the right to enter into contracts with employers, whereby, by those contracts, the employees are required, if they want to work at that plant, to join in with the majority group. That is all we ask. We do not ask any further compulsion.

Mr. Justice Black: What would be your position if the law had prohibited the making of a contract between the company and a company union which barred the employment of union men?

Mr. Thatcher: Which barred the employment of union men?

Mr. Justice Black: Of any men belonging to a union.

Mr. Thatcher: I will come to that later. That brings up the question of "yellow-dog" contracts and laws similar to the National Labor Relations Act, which prevent discrimination by employers because of union membership. There is a vast difference between the one case where the employer denies employment because of union membership, and where he denies employment because of nonunion membership, that is vital to this case. I will deal with that question at length later.

Mr. Justice Black: Is it your position that one is constitutional and one is unconstitutional?

Mr. Thatcher: That is right, Your Honor. The one provision would be constitutional, because of the consequences, the reasons, the social justifications for the provision; the other provision would not be constitutional, because of a lack of social justification.

Our theory of the case, which I will elaborate on later, just to pin down what our general theory is here, is as follows: We say that any law which flatly denies any closed shop agreement or arrangement imperils rights under the first amendment, under the fourteenth amendment, and under the contract clause.

The first amendment is involved in two ways. First, we assert that the refusal by members of a labor organization to work with non-members, and the consequent making of a contract providing that all become members and remain members, is an age-old practice indispensable to the functioning of a union in modern society, absent protections such as we have in the Railway Labor Act and under the National Labor Relations Act; and that any flat prohibition of that age-old practice and right is an impairment of the right of self-organization, and therefore an impairment of the rights under the first amendment, self-organization being a concomitant of the right of assembly under the first amendment. I will dwell on that

later also.

The first amendment is also involved a little more directly by this proposition: that the denial of the union security principle constitutes in effect and in substance a denial of the principle of self-organization itself; that it is absurd to support and give constitutional protection to the right of self-organization and at the same time deny the logical implications and extension of the right of self-organization, namely, the all union shop. I will elaborate on that later.

The fourteenth amendment is involved under this theory: that even though no fundamental rights are involved and even though the making of a union security contract merely is some species of property right or some contract right, nevertheless, a flat complete prohibition, as distinguished from a regulation, is without rational basis; that because of the importance and vital nature of that institution in modern economic society, total prohibition, where regulation could accomplish all desired results, is excessive and arbitrary.

Mr. Justice Frankfurter: Total prohibition does not preclude the right of every member, every employee, of an enterprise to join a union. These Acts do not prohibit complete unionization, in fact, of a plant, do they?

Mr. Thatcher: They do not, sir, no. But they prohibit a great deal more than that, as I will explain later.

Mr. Justice Frankfurther: I just wanted to get the fact.

Mr. Thatcher: That is right.

Now, we will have to make several notations, to begin with, that are applicable to all our arguments in this case.

First, it should be noted that the States, in all three cases, have absolutely prohibited, flatly prohibited-- not merely regulated -- the union shop relationship.

Mr. Justice Reed: They have what?

Mr. Thatcher: It is a flat, absolute prohibition on any union security relationship.

Mr. Justice Reed: You mean it is an absolute prohibition against closed shops.

Mr. Thatcher: Against closed shops, or, further than that, as I will point out, in the absence of agreement it is an absolute prohibition against any attempt by an employer to employ only union men, as in our Arizona case.

Mr. Justice Black: Does it go any further than the closed shop?

Mr. Thatcher: Yes, Your Honor. It outlaws union shop, maintenance of membership, any agreement or any arrangement under which one employee, even, is required, as a condition of his employment, to maintain his membership in a union. That is outlawed. And that covers closed shop, union shop, maintenance of membership.

Mr. Justice Black: It would outlaw any contract which would require a man to belong to a union in order to get a job?

Mr. Thatcher: In order to get a job, or retain a job -- as a condition of employment. That is right.

Mr. Justice Frankfurter: But he may belong, and still hold his job. He is not prevented from belonging.

Mr. Thatcher: That is right. He may belong.

Mr. Justice Frankfurter: This is not a prohibition against every man in a shop belonging to a union.

Mr. Thatcher: It is not.

Mr. Justice Frankfurter: All right.

Mr. Justice Rutledge: I do not understand you on that answer. Ithought you said that that was exactly what happened in the Arizona case.

Mr. Thatcher: Well, yes. If the employer refuses employment to one man because of his non-unionmembership, that employer is violating the law.

Mr. Justice Rutledge: In other words, it does prohibit his maintaining a union shop if there is any non-union man that wants work?

Mr. Thatcher: Yes, Your Honor. But it does not prevent a person from being a union member in this shop if he wants to be. I think that was Justice Frankfurter's question, was it not?

Now, this is a very important question, YourHonor.

The Arizona statute, or amendment --

Mr. Justice Black: You will have to give us that tomorrow.

The Clerk: This Honorable Court is now closed until tomorrow at 12:00 o'clock.

(Whereupon, at 4:30 o'clock p.m., Monday, November 8, 1948, a recess was taken until Tuesday, November 9, 1948, at 12:00 o'clock M.)

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