IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

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.

Case Numbers
27
47
34

Date: November 10, 1948.

(of 4)

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AMERICAN FEDERATION OF LABOR, ARIZONE 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 BUSINESSMEN'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.

Wednesday, November 10, 1948

The above-entitled cause came on for further oral argument at 12:30 p. m.

BEFORE:

Chief Justice Vinson, Associate Justices Black, 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
Irving Hill
Edson Smith
Robert A. Nelson
Ralph Moody

P R O C E E D I N G S

Mr. Chief Justice Vinson: The cases in argument are Nos. 27, 47, and 34, the American Federation of Labor, Arizona State Federation of Labor, and others, versus American Sash & Door Company, the Lincoln Federal Labor Union No. 19129, American Federation of Labor versus Northwestern Iron and Metal Company, and George Whitaker and others, versus the State of North Carolina.

The Clerk: Counsel are present.

ORAL ARGUMENT OF EDSON SMITH ON BEHALF OF APPELLEES -- (Resumed)

Mr. Smith: May it please the Court:

When the Court adjourned last evening, I was saying that my clients, a group of Nebraska businessmen, were interested in this litigation because, as businessmen, they do not want to be subject to the arbitrary domination of labor unions which the closed shop and compulsory union membership gives them.

I want to elaborate on that a little bit. Speaking for my clients, I can say that we also want equality of bargaining power. I suppose there is no such thing as exact equality, but we want it as nearly as it can be obtained.

Equality of bargaining power would not permit the prevalent practices of featherbedding. No employer is going to agree to that sort of thing, which we have described at great

length in our brief, page 44, in the words of Thurman Arnold, if it were not the case that the unions making those demands have more than an equality of bargaining power with the employer.

Nebraska businessmen do not want to be put into the straitjacket of a complex system of regulations that unions impose on employers once they have established a closed shop situation. And I do not have time to describe that, but we have described those briefly in the words of Professor Leo Wolman of Columbia University, a long-time labor union economist, on page 49 of our brief.

Nebraska businessmen do not want to be subjected to strikes and boycotts, called for the purpose of imposing compulsory union membership. An illustration of a strike for that purpose has been referred to twice by Mr. Thatcher in his argument, in connection with the Apex Hosiery case, where a business employing 2500 employees, with only 8 employees belonging to the union, was seized by union members from other businesses, and their property, the business property, destroyed -- wantonly, according to the statement to this Court -- for the purpose of imposing a closed shop on that business, in spite of the fact that only eight out of 2500 employees apparently wanted to belong to the union.

Nebraska businessmen do not want to be subjected to the power of the union to arbitrarily put them out of business, as

was done in the Crumbock case, which has been referred to already in argument. And the Crumbock case is no isolated instance.

In Thurman Arnold's Readers Digest article he says this:

"In Detroit three wholesale paper dealers are told by the teamsters' union to go out of business. There is nothing they can do about it. They are not allowed to hire union men; they cannot get their paper hauled. The union has made a deal with some employers to eliminate competitors. Likewise, 65 independent truckers in Pittsburgh are being forced out of business in spite of the fact that they are willing to hire union labor."

Nebraska businessmen do not want to be forced by the power of unions to join in monopolies in restraints of trade of the type illustrated by Allen Bradley vs. Local No. 3.

We have the electrical workers' union in Nebraska, and it is a powerful union. And in that connection I would like to examine briefly what it is about the closed shop, compulsory union membership, that gives the union leaders this arbitrary power.

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Perhaps a little light can be thrown on that by reading from the constitution of the Electrical Workers' Union. It provides -- and it is quoted on page 24 of our brief -- that a union member can be thrown out of the union for creating

or attempting to create dissatisfaction or dissention among any of the members, or for working in the interest of an organization or cause which is detrimental to the union. And there is a provision that no union member can circulate hand bills or marked ballots or any of that sort of thing, in order to influence any member of the union to vote for a certain union officer or against a certain unionofficer, or to vote for a certain delegate to a union convention. In other words, the union's own constitutional practically prevents democratic processes in that union, and gives the power to the union officers.

Now, there are two things I want to mention in connection with this power of the union. They talk about reasonable discipline. "The union member must, of course, subject himself to the 'reasonable discipline' of the union." What does that mean? I can only illustrate by two things. No union member can cross a picket line thrown up by his union or any other union which is on good terms with his union. If he does, in spite of the fact that his employer wants him to go to work, the union requires the employer to fire him. The union has control over the employment and discharge of that man; not his employer.

No union men can work or accept for work non-union made goods, any goods that are called "hot." Now, we have in our brief some illustrations of these secondary boycotts from

Nebraska, pages 40 and 41 of the brief, where the union checker at a truckers' depot refuses to give shipments of goods that are being transported over trucklines to the employees of a trucker who is not a closed shop trucker; and that, of course, in spite of the factthat the employer was quite willing to sign a closed shop agreement if his employees wanted to belong to the union. But the checker there refuses to give the goods to the non-union trucker because, he says, "If I did, I would be filed $25 by my union." And that would be a first offense, of course. For a continued offense against the union, which would probably be a second offense of that sort, that checker could be discharged from his job on the demand of the union.

Naturally, under those circumstances, the employees' loyalty although compelles, is loyalty to the union leaders, not loyalty to the man that provides them with employment, their employer.

Subjecting the employees to this kind of discipline of the closed shop is what caused the Hartley Committee, after listening to two million words of testimony, to say with reference to the American working man that: "In short, his mind, his soul, and his very life have been subject to a tyranny more despotic than one could think possible in a free country."

Mr. Justice Rutledge: How do you reconcile that statement with the fact of which I think we can take judicial

notice, that in a very large number, perhaps the largest number, of cases, in which there have been elections held under the Taft-Hartley Act among employees for the determination of the question whether or not they shall have a closed shop, the result has been favorable to the institution of the closed shop.

Mr. Smith: One reason is that the union never calls an election unless they are sure they can win it.

Mr. Justice Rutledge: These are elections conducted under the auspices of the Taft-Hartley Act.

Mr. Smith: The second answer to that is that under the Taft-Hartley Act there is no union shop in the usual sense. Attorneys for the labor unions here have referred to it as a union shop.

Mr. Justice Rutledge: You are just now making the distinction between the closed shop and the union shop.

Mr. Smith: Under the Taft-Hartley Act, the union shop is only a union shop to the extent that the union can collect the dues and initiation fees.

Mr. Justice Rutledge: Do they not become members of the union?

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Mr. Smith: In a sense they become members, but the union has no control over those men, no "reasonable discipline" as Mr. Thatcher would say, to get those men discharge for failure to obey any union rule. The man under the Taft-Hartley

Act in the so-called union shop can say, "I will go through a picket line if I please. I won't engage in this secondary boycott in spite of the orders of my union leaders."

Mr. Justice Rutledge: You think that is the reason that --

Let me finish my question, if you please, sir.

Mr. Smith: Excuse me.

Mr. Justice Rutledge: You take that to be the reason why these majorities have so preponderantly been in favor of the union shop when these elections have been held?

Mr. Smith: That is at least a partial reason.

I might add that with all of the information which has been collected in these briefs, and which has been thoroughly discussed by the public, the union members are not all thoroughly aware of the pressure that the union can put on them.

Mr. Justice Rutledge: Well, I am just questioning your statement as to the universal tyranny of unions, where union shops are accepted by the majority of the employers. It does not mean that the tyranny may not exist in many instances, but it would take more, in view of this evidence, than the mere statement that it is universal.

Mr. Smith: Of course, Your Honor, that statement was made in the Committee Report of the Hartley Committee, before the Taft-Hartley Act was adopted and before it went into effect.

Mr. Justice Rutledge: Still, it does not take account, it could not take account, of the experience under the Act itself, which does permit the union shop, which, for this purpose, seems to me entirely non-distinguishable from the closed shop.

Mr. Chief Justice Vinson: Your time has expired.

ORAL ARGUMENT OF ROBERT A NELSON ON BEHALF OF APPELLEES.

Mr. Nelson: May it please the Court:

I am here in behalf of the State of Nebraska. The Nebraska suit is an action for a declaratory judgment as well as a suit asking for an injunction against the employer. Under the statutes of Nebraska, when a declaratory judgment suit is brought which challenges the validity of any statute or any Constitutional amendment, it becomes necessary that the state be made a party.

In answer to a question, I think, that was asked by Mr. Justice Frankfurter yesterday, regarding the notice that was required under the statutes of the State of Nebraska, I might say this: This amendment was enacted through the initiative power, which is reserved to the people under our Constitution. The Constitution requires that signatures must be secured on a petition to the number of 10 per cent of those who voted for Governor at the last election; and that these must include five per cent of the electors in each of two-fifths of the

counties within the State. Such petitions were presented to the Secretary of State for filing. An action to enjoin the Secretary of State from placing this measure on the ballot wa brought by the Unions. A trial was had, which lasted approxi mately two weeks.

During that time, great publicity was given to the law-suit and to the questions involved. Following that, both sides of the controversy publicized the question thoroughly, so that the people of Nebraska were fully informed of the contents of this amendment when they went to the polls; and it was adopted by a vote of approximately three to two.

So in the Nebraska case it is not correct, as Mr. Thatcher stated in the Arizona case, that this was carried by a small majority. This was by a large majority.

Our Act is very simple and entirely inclusive. Section 1 of the Act, which is the meat of the provision, provides now that no person shall be denied employment because of member-ship in or affiliation with or resignation or expulsion from a labor organization or because of refusal to join or affiliat with a labor organization, nor shall any individual or corpora-tion or association of any kind enter into any contract, written or oral, to exclude persons from employment because of membership in or non-membership a labor organization.

Section 2, which is Section 14 of our Constitution now, merely defines a labor organization in the exact terms used

in the National Labor Relations Act, in the Labor-Management Act.

Section 3 makes the provision self-executing, and further provides that the Legislature may provide legislation to facilitate its operation.

So as far as the argument is concerned today, I think that the only provision that we need to be concerned with is Section 13. As I understood from Mr. Thatcher's opening argument, he admitted that if this is a proper exercise of the police power, the fact that it was made self-executing and affecting existing contracts was not in question.

My time is very limited, and I would like to call the attention of the Court to the construction of our Nebraska Supreme Court of this Act.

In American Federation of Labor versus Watson, this Court denied jurisdiction because of the fact that the state court had not defined the law. Our court has done so, and in very simple language. And I would just like to read these few words from the opinion of our Supreme Court:

"As we construe Section 13, the first part thereof, down to the semi-colon, simply provides that the hiring and firing of no individual shall be dependent on his membership or non-membership in alabor organization. He is thereby made free to associate with his fellows in a union entirely upon its merits, or to

decline to associate with his fellows, without imperiling his right either to obtain employment or to continue therein after having obtained it. In other words, the lawful right of the individual to enter employment, and his lawful right to continue in his employment, cannot be lawfully made to depend either upon one condition or the other, and he is given a cause of action for violation of the right."

Now, that is the construction of the Supreme Court of Nebraska with reference to this amendment.

It seems to me that the question involved here is a very simple one. The question of whether this violates the first amendment or the 14th amendment has been thoroughly discussed here by counsel, and I do not wish to repeat any of those arguments.

I want to call attention to the fact, however, that we are dealing here with individual rights, with the rights of the individual, and perhaps dealing as much with the rights of the individual union member as we are dealing with the rights of the non-union member.

Mr. Justice Reed: You are dealing with the individual rights of corporations, too?

Mr. Nelson: Oh, yes. In their right to contract, or their right to deny employment to any person because of his membership or non-membership in a labor union.

Mr. Justice Reed: And you forbid them from entering into a contract to employ only union men?

Mr. Nelson: We do. And I might say this, Mr. Justice Reed: that according to the provisions of Section 15, the Legislature may enact legislation to facilitate the operation of this Act. The 1947 Legislature did adopt an act which make it a misdemeanor to enter into a contract which would deny employment to any person because of his membership or non-membership in a labor union.

Mr. Justice Reed; That means to me the degree to which the employer would agree to employ a union man.

Mr. Nelson: That is correct, or it is broad enough to cover the Yellow Dog contract, if he entered into an agreement whereby he would not employ a union man.

Mr. Justice Reed: My question was prompted by your statement with respect to the rights of the individual.

Mr. Nelson: Well, may I explain that byan illustration:

We might have a union, an organized union, whose employees are employed with a certain corporation. Now, perhaps the leadership of that union becomes such that certain members of the union do not desire to go ahead with them. They are not satisfied with their policies, or the things that they are doing. They are entirely free to disassociate themselves from that union, and still they are assured of employment with the company. They cannot be fired on that score.

Therefore, I say that the protection goes to the individual union member just as much as it does to the individual non-union member.

Mr. Justice Reed; Yes, but what about the protection of the corporation in making the contract it wishes? Is that interfered with?

Mr. Nelson: Oh, yes, very definitely the corporation is prohibited from entering into the contract.

Mr. Justice Reed: And also an individual employer?

Mr. Nelson: An individual employer as well. It is all-inclusive, so far as that is concerned.

Some discussion was had regarding the history of this legislation that outlawed the Yellow Dog contracts. Of course we are all thoroughly aware that originally Yellow Dog contracts were held valid. We are all familiar with the Coppage and the Adair cases.

Then there came a general trend and a change, where they were held invalid.

And I just wish to call the attention of the Court to a case, People vs. Marcus, 185 New York 257, 77 Northeastern 1073, where a statute that outlawed the Yellow Dog contract was held invalid. In a deciding opinion, Justice Bartlett made this statement; and I just want to read a few words:

"I vote to reverse the order of the Appellate Division and to affirm the judgment of conviction.

The freedom of contract should be untrammeled. A person desiring employment ought not to be required to abstain from joining a labor organization, nor should he be compelled to join a labor organization. The statute should have covered both cases. I regard this legislation as a step in the right direction, although it was evidently drawn in the interest of labor organizations and without regard to securing absolute freedom of contract. The employer is to be protected, and the employed as well. I trust the day is not too far distant when to every working man will be open all the avenues of employment, whether he belongs to a labor union or other organization or stands alone upon his individual right to work for such a wage as seems just to him. This statute is not, in my opinion, unconstitutional, but is to be regarded as a step in the direction dictated by every consideration of public policy."

Also, in the Adair case, Justice Harlan made this observation:

"It may be observed in passing that while the section makes it a crime against the United States to unjustly discriminate against an employee of an interstate carrier because of his being a member in a labor organization, it does not make it a crime to

unjustly discriminate against an employee of the carrier because of his not being a member of such an organization."

Those are interesting comments, because it shows that certain of the Justices who considered these cases, when the change came about here, considered that the statute should have gone both ways. Because of the abuses on the part of employers, perhaps that was overlooked, and the union members were protected in their right to employment, but the non-union members were forgotten.

Now, apparently, the time has come when the people of Nebraska, as well as the people of a good many other states, feel that this right that is given to the union member and that is not given to the union member has created an evil situation that ought to be remedied by legislation.

I think that the Court must take judicial notice of the fact that at least at the time this case was heard there were 18 states that had similar legislation, similar regulations, either through legislative enactment, or through constitutional amendments. They apparently felt that the evil that exists in the management-labor relation is the closed shop, or the union security shop, and have therefore legislated to eliminate that.

Of course, as it has been said before, whether they are right or wrong in their conclusion, that is not for the Court

to determine. But I think we all have to realize, and I think the Court will take judicial notice of the fact, that there must be some evils. There must be something that needs regulation, when labor unions, through a strike can cripple an entire industry, when it becomes necessary for the Government of the United States to come in and take over an industry in order to carry on. And if the closed shop is the evil, and if, through this legislation, we have remedied that evil, I think we have accomplished a great deal. If we are incorrect in that, through legislation that matter can soon be corrected.

It seems to me that this legislation is purely a matter of giving equal rights to all men concerned. The appellants have raised in their petition and in their briefs the question that this legislation violates the equal protection of the laws clause. I merely wish to call the attention of the Court to a simple statement in Truax vs. Corrigan where they conclude that the guarantee of equal protection "was intended to secure equality of protection not only for all but against all similarly situated. Indeed, protection is not protection unless it does so."

The constitutional amendment adopted by the State of Nebraska, I believe, does that very thing. It assures to the non-union member protection not only against the employer but against the union that may be attempting to force him into membership when he has no desire to come in. It grants

protection not only for all but against all similarly situated

I submit that the ruling of the Supreme Court of Nebraska should be sustained.

Thank you.

ORAL ARGUMENT OF RALPH MOODY ON BEHALF OF APPELLEES

Mr. Moody: May it please the Court:

I represent North Carolina, and I would like to undertake, in a very short time, to state to the Court the position of North Carolina in this case.

It goes without saying that I know the various phases of the case, as to the constitutional questions and the rules applicable, have already been covered.

This case arose in North Carolina on criminal indictment. The North Carolina Act was passed in 1947. The Court will find the North Carolina Act in the brief in Case No. 34, North Carolina's brief. You will find the North CarolinaAct on page 2 of the brief. You will also find it on page 58 of the record.

I think that some of the pertinent provisions of the North Carolina Act should be called to the attention of the Court. The Court will see that the North Carolina Act is somewhat different from the various acts now before the Court in the other two cases, in that the North Carolina Act has seen fit to emphasize the combination in restraint of trade, or

the monopoly feature, that has been contended for here even in the other acts.

The Act, reduced to its simplest terms, could be set forth in this way. It says to an employer that he cannot require, as a condition of employment, a person to become or remain a member of a labor union. He cannot require a person to pay any dues, fees, or charges to a labor union. He cannot require a person to abstain or refrain from membership in a labor union.

Then we get to the combination in restraint of trade feature of the statute, which the Court will see in Section 2, as I believe it is. That may be broken down, I think, in this manner: that any agreement between an employer and a labor union involving these various factors, denying the right to work to non-union men, requiring union membership as a condition of employment, or, three, continuation of employment, or, four, an agreement whereby a union requires an employment monopoly in any enterprise, shall, if it contains all of these elements, be constituted an illegal combination in restraint of trade or commerce in the State of North Carolina.

I think it should be emphasized that it was contemplated by Section 2 of the statute that when the restraint of trade reached into such situations as where a union, operating under a closed shop, reached into an agreement by an employer, or when a closed shop or union shop or any such agreement that

the crafts or trades involved -- this was in the building and construction trade -- created an employment monopoly, it created a monopoly in that respect as against employees who were not members of the union. I think those two aspects of the matter can be considered. Because you will notice that the latter part of Section 2 of the statute states that "it is hereby declared to be against the public policy and an illegal combination and conspiracy in restraint of trade or commerce in the State of North Carolina" where "any such union or organization acquires an employment monopoly."

So it seems to me that the employment monopoly is specifically designated in the statute.

Before going any further in the matter, from North Carolina's point of view I think it should be pointed out that there has been some misunderstanding, perhaps, about the Bishop case, which was a companion case in North Carolina, which is not before the Court but which has been mentioned in the argument. I think counsel for appellants inadvertently said that Bishop was indicted for employing a union man. Of course, the Bishop case was simply this: Bishop was a construction contractor in the city of Asheville, and he operated under the closed shop system, as all of those people do in that neighborhood, in that community. There was a man by the name of Smith who was one of his employees, and who was a member of the Union. Smith decided that he did not

longer want to abide by some of the union rules, or at least pay the dues, and he was suspended or discharged from the union, from his membership in the union. Bishop told Smith that he could not retain his employment as long as he was out of favor or was out of membership in the union. Smith replie to Bishop that he understood that there had been a law passed which gave him a right to not belong to the union if he didn' want to, and therefore he should retain his employment.

Tom Bishop flatly replied that he could not work any long with him, as he was not a member of the union, and to get his tools and not be on the premises.

Three or four days later Smith came back and told Bishop that he had now reinstated him in the union. He showed him a certificate of reinstatement and receipt for his dues paid, and Bishop employed him again.

Now, Bishop was indicted because he failed to continue his employment, and because he required union membership as a condition for continuation of the employment.

In that case, Mr. Thatcher and those who represented the American Federation of Labor simply took the position that the statute itself, on its face, did not spell out a crime. They in their motions in arrest of judgment and other motions properly raised constitutional questions, but in their brief they abandoned the constitutional questions. No position was taken that the State did not have a right to define these acts

as a crime, or that the statute was too vague, or any of thos things.

Our court simply said that where a statute prohibited a matter of public grievance, or by mandate required something o public convenience to be done, and no penalty provision was required, the common law would sanction the finding that a misdemeanor had been comitted. And punishment under a misdemeanor is established at common law in our State.

That was the situation in the Bishop case. There was no new principle in it. The court simply followed older cases than the Bishop case following that principle, and they were cited in the opinion of Mr. Justice Sewell.

Now, if I may come to this case for just a minute, I think that we should consider first what the North Carolina statute does not do. But before that let me state this to the Court: The Court will find that the indictment is on page 10 of the record in No. 34. It perhaps should be stated that the indictment in the North Carolina case does -- I think I am wrong about that. It is on page 2 and 3 of the record in 34. The Court there observed that the indictment does stress

c7 the illegal combination or conspiracy in restraint of trade, and the indictment is generally framed along those lines; although the other sections of the statute do support the indictment because they forbid a man to refrain from using the union membership as a condition of employment.

The North Carolina statute, it seems to me, does not prohibit organization of trade unions in any respect. I say that in spite of Mr. Thatcher's intense argument as to the necessity of the particular closed shop as highly necessary for the maintenance of trade unions. It does not authorize injunctions. It does not deny any freedom of speech or assembly. It does not prohibit contracts as to wages, hours, and working conditions. It does not prohibit the employment in an enterprise of all union employees. And Mr. Thatcher states that it forbids all types of union security clauses, maintenance of membership, and things of that nature.

Whether it is of any value or not, I might state to the Court that as we have construed the statute, it does not forbid a voluntary check-off, and voluntary check-offs are in force in the State.

I think, therefore, that states the case except for the fact that in the Whitaker case the facts were simply these: Whitaker was an employee in the building and construction business in Asheville. He testified that he employed union labor exclusively. He went into detail as to what he thought were the advantages of employment of union labor, and he stated them quite clearly in his testimony; that is, that they maintained considerable uniformity and s tability in the enterprise. He went into great detail in that. And he testified that he had entered into an agreement whereby the building

and trades unions -- there were certain craft unions there, such as the paperhangers, decorators, painters, electricians, and others -- all together, in what is known as the building trades council. He entered into a contract with the Building Trades Council, and with the appropriate officers of the unions, that he would operate a closed shop.

Now, I think the contract should be called to the attention of the Court. It is in record No. 34, on page 10.

I think some features of that bear out our monopoly side of the matter. I would call the court's attention first to paragraph 1 of the contract, in which it is stated that, of course, the employer agrees to employ none but union members affiliated with the building and construction trades. Second, the employer agrees to provide in the specifications -- Now, Whitaker agreed that when he was doing any business with any subcontractor, the subcontractor will use none other than members of the respective unions affiliated with the building and construction trades council.

You see, therefore, how the contract amplifies and reaches out into the men who are designated as subcontractors and who otherwise are not directly concerned in the contract.

He agreed that he would use members of good standing in the labor unions, considered by the employers as skilled, semi-skilled, and unskilled labor. He agreed that the building and construction trades council would fix all of the rates

of wages, specific hours recognized by the respective trades, and that in the event the employer would engage subcontractors to perform the work, it was agreed that those subcontractors had to abide by these rules.

I think it also should be called to the attention of the Court that this agreement has a territorial matter in it which reaches also, I think, into our contention on the monopolistic feature, and that is that the agreement is to cover the entire district under the jurisdiction of the Building Trades Council, which is half way to the next county in any direction.

I think it should be stated to the Court that our office does not try the cases below; that they are handled by the Solicitor, and we only handle them on appeals.

In the testimony, however, many people testified who were officials of the American Federation of Labor. All of them gave their opinions as to the beneficial effects of closed shop contracts. One of the organizers testified, one of the witnesses who, I think, was their publicity man, giving it as a conclusion that there was no labor monopoly in that section. However, the statute says "in any enterprise."

As I stated to the Court before, I do not intend to review all of the arguments that have been made in the previous cases. I would like to say this, though; which I do not think has been emphasized. Much argument has been

made here, and Mr. Thatcher devoted a large part of his brief to such argument, under the first amendment. I do not intend to go into that, but I think it should be emphasized.

Certain cases were cited by Mr. Thatcher, such as the Thornhill case, Thomas vs. Collins, Hague vs. CIO, and other cases of that nature.

Mr. Thatcher, it seems to me, wants to say, or would contend, as to those cases, that because freedom of assembly and freedom of speech was involved -- he wants to bring in the protection there to cover the labor activities which he denominates in some parts of his brief as "economic activities." I merely wish to state this, and I think it is clearly shown by those cases: It seems to me that the Court, in construing those cases, was careful to point out that labor activity, as it was involved in those cases was merely the vehicle, or the technique by which the ideas were disseminated, and the Court was actually reaching into and protecting the fundamental rights covered by the first amendment, and protected under the 14th amendment, and the Court was really doing that despite the fact that the vehicle of dissemination of the ideas happened to be a labor dispute, or some form of picketing of that nature.

The fact that the freedom of speech and of assembly was compounded and inherently bound up in the picketing and in the labor activity, it seems to me, brought about those statements by the Court that the circumscribing of economic activity

or an attempt to circumscribe economic activity did not in any way militate against protection of ideas and their dissemination. I think that was touched upon by Nebraska, but I think that should be emphasized, because it distinctly shows that tha does not go into a protection of economic activity.

Now, if you will, take the other side of the case, concerning another economic group, over on the other side. For example, take the Associated Press case. In the Associated Press case, there was, of course, there involved the matter of whether or not there had been an infraction of the Sherman Act. But the same position, the same basic argument, was set up, as I see it, that newspapers were engaged in what is fundamentally protected under the first amendment, and that
09 was the freedom of the press, and therefore they were entitled to that shield in their activity, and as a protection against any indictment under the Sherman Act.

One sentence on that: The Court disposed of that very quickly, saying that the fact that publishers handled news while others handled food does not, as we shall later point out, afford the publisher a peculiar constitutional sanctuary in which he can with impunity violate laws regulating the business basic practices. And the Court goes on to point out, of course, that the "clear and present danger" doctrine cannot be negated by converting it into a shield, by newspaper publishers actually engaged in the newspaper business.

On that particular matter, I might point out -- although I do not know that it is any particular argument to make to the court, that Mr. Thatcher has gone to the trouble to rely on an article by Mr. Witherspoon which was reprinted in his economic brief, on which Mr. Witherspoon undoubtedly did make certain arguments, in fact a great many of them, to support Mr. Thatcher's cause. And it might be pointed out, however, since he is relying on that, that Mr. Witherspoon comes to the conclusion, on record, page 15 of the economic brief, that the right is really an economic right and that it would require the application of the test of reasonableness in considering such a right.

Mr. Justice Frankfurter: I thought I got the impression that Mr. Witherspoon generously suggested that we might find ground for reaching Mr. Thatcher's conclusion.

Mr. Moody: Yes, I think he generously suggested maybe two or three grounds that you might find. One of them was that you might invent a doctrine which he calls "substantial negation," or some such name as that, which I do not profess to understand.

I did want to call that to the attention of the Court, however, because Mr. Thatcher seems to rely a great deal on what Mr.Witherspoon says about the matter.

We think that the North Carolina statute is supported by the feature of monopolies. I think basically it gets back to

the same question, however, as to the various tests of reasonableness and the exercise of the police power. Although debatable, such rules -- and I am not now going into them -- we think it is supportable on that basis.

However, I would like to point out to the Court that there is an indication that this Court feels that the police power of the States, in dealing with and regulating monopolies and in defining what acts shall constitute monopolies -- and I think the State has a right, and in fact it has been demonstrated by the statutes, to define what shall constitute monopolies and combinations in restraints of trade -- is much greater than the scope of power under the Sherman Act, or what the Congress may do under the Sherman Act; and we think this court has indicated its opinion as to the States' powers in that direction. We feel that that is pointed out in the case of Watson against Buck, in which I believe it was Mr. Justice Black, in writing the opinion, who said --

Before I quote that sentence, however, I might say that the Court will remember that that dealt with the authors and composers and publishers in the State of Florida, who were tried in that case for indulging in combinations in restraint of trade.

Now, in this case, the Court said, "In the consideration of this case, much confusion has been brought about by discussing the statutes as though the power of a state to

prohibit or regulate combinations in restraint of trade was identical and went to further than the power exercised by Congress in the Sherman Act. Such an argument rests upon a mistaken premise."

I judge by the statement of the Court in the Watson case, Watson against Buck, that the Court has said, or it clearly implies, that there is a large reservoir of power left to the States under the exercise of their police power, to declare and to formulate in statutes what shall constitute combinations of in restraint of trade and what acts shall be added to the list of acts that constitute combinations in restraint of trade, where there is already an antitrust statute in the state. I think it should be pointed out that we already had an antitrust statute in our state. You will find the sections that we think are applicable in our own antitrust statute on page 52 of our brief.

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On page 52 of our brief you find that we previously had declared that any agreement or combination in restraint of trade was illegal in our state and we provided appropriate penalties and punishments. We had previously declared in our state antitrust law that "any act, contract, combination in the form of trust, or conspiracy in restraint of trade or commerce which violates the principles of the common law" is declared to be a violation. The Court will find that on page 52 of the brief. And it is our contention, of course -- and

I think the Supreme Court of North Carolina proceeded on the assumption -- that the declaration that these acts constituted restraints of trade and combinations were attached to and became a part of our antitrust statute.

I do not propose, of course, to discuss the various cases that this Court has decided, in which it has been held that it is a reasonable exercise of the power of the state to declare what shall constitute monopolies. We have cited many of them in our brief, and I think that power, of course, is well settled. We have also cited many state courts.

To sum up, briefly, the argument on monopoly, I think we would state that the monopoly statute of North Carolina definitely states that such contracts as were entered into by the Building and Construction Trades Council are, in the mind of the State, definitely constituted as monopolies. And we think the state had a right to so declare and to describe these acts as monopolies. And especially would that be so in this case, we think, when you read the contract and when you find the restrictive covenants in the contract, and when you find the territorial power of the contract is also considered; and that the wages and rates of wages and all that sort of thing is fixed, and it is tied together in a closed shop contract.

Now, it is stated in the record, I think, how many people in North Carolina are under the closed shop contract

in the building trades unions. In fact, if I understand the material that Mr. Thatcher has placed in his economic brief, in his graphs and charts -- if I understand them correctly -- we will see that the crafts and trades in the building industry are the most tightly organized crafts and trades that he illustrates. We say, therefore, that that being so, in this identical case, in all of the crafts and trade unions combined, it is easy to see, not only under the North Carolina statute which provides for an employment monopoly, as well, as we say, as other forms of monopoly that flow from the closed shop contract -- that as to the building trades in Asheville and in that community, these various crafts, associated and affiliated together in this building trades council, it is easy to see from the evidence and contract that they control the building trade industry in Asheville. The contractors, of course, will not do business with anybody else engaged in buildings or crafts with the closed contracts, and, as has been shown in several cases in this Court, that leads easily to agreements that you will make with contractors that you will keep out other contractors and thereby sew up the whole business in building trades in that community.

I have stated the cases which we rely on for the state to exercise such a power.

I pass on, briefly, to a mere statement of the police power, in which I will not advance any argument that has

already been covered, but I do merely wish to stress this particular factor, and that is that these 16 states which have enacted these laws are not exactly, as I think Mr. Thatcher claims entirely agricultural states.

For instance, take my own state, the State of North Carolina. It has textile industries to a great degree. It is engaged in the tobacco industry. I am sure that in no other State of the Union is more cigarette production carried on than in that state. We have a large furniture industry, and various other industries in North Carolina. In fact, we claim, and with some pride, that it is a balanced state between agriculture and industry. And I think it should be pointed out that all 16 of these states that have seen fit to enact these laws are not exactly agricultural. Some of them may be, it is true. Tennessee can by no means said to be entirely an agricultural state. Neither can Texas. Neither can Georgia, whose industries are increasing. These 16 states represent one-third of the states of the nation.

Not only that, but these 16states contain some 32 million people, and the representatives of some 32 million people considered and passed this in legislative systems in each of the states which considered them. And all of the states excepting Nebraska have the bicameral system, in which bills went through both Houses.

And I daresay Mr. Thatcher and his people were there

looking after their business and their interest. I know they were in my state. And this matter was not passed in any wave of hysteria or excitement, as I see it, but was passed after considered judgment in all of these assemblies. And, as has been previously stated, there was some feeling that something should be done about it, whether wise or unwise, and even maybe highly debatable. Therefore, we say that the states, in exercising their powers of government, naturally had the right to say what in their considered judgment was the thing to be done about the matter.

I do not, of course, go into the question of the Taft-Hartley Act and the findings of the committee in Congress, because that has been so thoroughly debated here. I pass on now to the matter of prohibition versus regulation.

I think it should be pointed out and stressed again that the cases cited by Mr. Thatcher deal with conditions wherein things were entirely prohibited. Now, of course, if you were to agree with Mr. Thatcher that the closed shop is the equivalent of or synonymous with the entire labor union movement, and the entire labor union organization, highly indispensable, as I believe he states it, there might be some ground for argument. The fact is, however, that a closed shop contract is a mere incident of the whole process of labor negotiation, and bargaining. We are dealing, I think, more with a relationship than anything else; that is, in negotiating, in bargain-

ing, for various things. They may be reduced to a contract. But I do think that Mr. Thatcher in his argument stresses the fact of the closed shop contract much as he would particularly pick out one tree and say that that was the whole forest.

We say, therefore, that the legislature had a right to suppress the whole closed shop principle, which, as we say, was the whole abuse itself.

Mr. Justice Rutledge: Mr. Moody, may I interject an inquiry?

Mr. Moody: Yes, sir.

Mr. Justice Rutledge: I do not think that what I have in mind is this case. At least, I am not yet sure whether they are so closely related that the one goes with the other.

Let us assume that you do not have any closed shop contract in the particular plant, but that you do have all union employees. Then a vacancy occurs, and the employer brings in a non-union worker; and the other employees then strike.

Would they be guilty of crime under your law?

Mr. Moody: Well, frankly I do not see how they could be. Our law does not, as I understand it, in any way undertake to --

Mr. Justice Rutledge? Their agreement to deny their services to their employer because of his refusal to keep a closed shop, even though without contract, would not be a violation of your statute?

Mr. Moody: I do not think so. That is an agreement with the employer. And this is action that the employees have decided to take themselves.

Mr. Justice Rutledge: Your statute does not forbid closed shop arrangements, or agreements to which the employer is not a party formally?

Mr. Moody: I do not think so, by any means, sir.

c12 Mr. Justice Frankfurter: Would it not be argued that impliedly, if that is a crime for some people, it could be argued as a matter of common law principle that it is a tort and enjoinable?

Mr. Moody: Let me see if I fully understand that now.

Mr. Justice Frankfurter: You say that the statute does not cover it explicitly. That is your position.

Mr. Moody: Yes, sir.

Mr. Justice Frankfurter: But it does cover the making of such an arrangement. What I am suggesting: If making such an arrangement is a crime, why would not your court argue as a matter of common law principle that it is a tort enjoinable by injunction to bring that kind of pressure to bear which as between other parties is a crime.

Mr. Moody: Is Your Honor reaching into the point that such a strike would be a strike for an illegal object?

Mr. Justice Frankfurter: Yes.

Mr. Moody: A strike for an illegal object?

Mr. Justice Frankfurter: Yes.

Mr. Moody: Well, I do not see what the employees would do about the matter; and their right to strike would reach over and go into the question of the contract with the employer.

Mr. Justice Rutledge: No contract is involved. I stated explicitly: without that contractual provision. But an all-union shop maintained voluntarily up to that point. Then comes in this man, by agreement. Then there is a strike. What I am asking you is whether this statute really reached beyond a formal contractual agreement, and does reach into the right to strike.

Mr. Moody: I cannot see that from the language.

Mr. Justice Rutledge: The right to strike to keep a closed shop, in fact.

Mr. Moody: From the language of the statute, it seems to me that it only forbids the contracts.

Mr. Justice Frankfurter: They certainly, I should suppose could not strike and picket with placards, saying "We want a closed shop," could they?

Mr. Moody: I really do not see why not.

Mr. Justice Frankfurter: Well, they would be wanting something that was forbidden by statute.

Mr. Moody: I think the court could say, though, that they wanted it.

Mr. Justice Frankfurter: Anyhow, that is not this case, you see.

Mr. Justice Rutledge: I am not sure that it is not related to it.

Mr. Moody: Of course, it would be related.

Mr. Justice Rutledge: You take one step, and then you take another step, in this business, always. And taking one may be half of the other one, and more.

Mr. Moody: I do not know.

Mr. Justice Rutledge: What about the language in Section 2, "* * * whereby any such union or organization acquires an employment monopoly in any enterprise"? I suppose that refers back to agreements or contracts.

Mr. Moody: It refers back to agreements, I think, sir.

Mr. Justice Rutledge: An agreement covers anything that follows in that section, perhaps. I suppose your easiest answer here would be that if you do not have that case, and that would bring about an unconstitutional situation --

Mr. Moody: That of course is true, but I do not see hardly how it reaches into those other matters, and how it reaches into a strike, if they want to strike.

Mr. Justice Rutledge: If you prohibit a closed shop?

Mr. Moody: But we do not prohibit strikes.

Mr. Justice Rutledge: Well, you are then saying that you cannot prohibit the very thing that a strike is called for.

And the strike to get it is legal.

Mr. Moody: No, sir. It seems to me that the question of strikes is entirely a matter not within the scope of the statute at all. It only reaches into the agreements, combinations in restraint of trade.

Mr. Justice Rutledge: The statute forbids something that a strike is an instrumentality to get. It makes it illegal to have this very thing -- I am assuming that, of course making that assumption -- makes it illegal to have an all union shop, a closed shop.

Now, then, we are unionising this shop. We may be violating the law by doing that. But in any event, we want to keep it, and we withdraw all of our economic force, if we strike, and say to that employer, "We are striking so that you will discriminate against this non-union man because of his non-membership in the union."

Mr. Moody: I do not see where we can indict anybody on that or take any action at all. Because we are centered entirely on the contracts that the employer makes. That is the stress.

Mr. Justice Rutledge: Then you would indict the employer, I assume, when he succumbed to the pressure brought about by the strike and put a union man in place of a non-union man.

Mr. Moody: We can only indict him, sir, as I said, on contracts, on failure to observe, and incorporating those

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provisions in contracts.

Mr. Justice Rutledge: You mean you cannot bring any indictment in this statute where there is not a closed shop agreement to which the employer is a party?

Mr. Moody: That is right, sir, as I see it. That is the language of it.

Mr. Justice Rutledge: Well, that is as far as I can go. If that is all your opinion, that is all I could ask for.

Mr. Justice Reed: You said some time ago that so far as voluntary action was concerned there was nothing in the statute which prevented voluntary collection of union dues.

Mr. Moody: We have so construed it, Your Honor. We have said that in our opinion the employee, if he wishes to go to the employer and say that he wants to make an assignment to dues -- we do not see anything to prevent it.

Mr. Justice Reed: You would require the employee to make the assignment?

Mr. Moody: Yes, if he wished to do that.

Mr. Justice Reed: But the employer could not agree with the union to make a deduction.

Mr. Moody: Yes, I think so. In fact, I think we have them operating in the state today on that system. I am pretty sure we have.

I think, may it please the Court, that I have explained

the position of the State of North Carolina in regard to the matter, unless there are some further questions about the matter. I think the issue involved is a little bit greater than the whole question of a mere closed shop. I think the issue involved to a large extent is going to be whether we have free expression and voluntary unionism. I think the issue in the last analysis that is raised is simply this: Are the unions going to conduct themselves, are they going to so conduct their unions, are they going to so bring about internal rules in their unions of a democratic nature, are they going to make their services to the working man so beneficial, that the working man will want to join the union without anything compulsory put into it? I think that is one of the greatest issues in the whole case: are we going to have compulsory unionism in this nation, or are we going to have a union which makes itself of such great value to the working man that he naturally gravitates to its membership.

ORAL ARGUMENT OF HERBERT S. THATCHER ON BEHALF OF APPELLANTS - (Resumed)

Mr. Thatcher: May it please the Court:

I think we have a few minutes remaining.

First I would like to answer the question propounded by Mr. Justice Jackson yesterday as to whether, as I get the question, the principle inherent in the Wallace, Wallace vs. NLRB, does not support total prohibition of union security agreements

as contended by the states.

As I read the decision it does not. It may support regulation by the state, and it very well may support regulation by the State, but not prohibition. As I read the case, it involves merely a situation where a group of employees under a closed shop contract are willing to join the union and become parties to the contract, but are refused opportunity to join the union by the union, by its rules; and furthermore that the employer, knowing in advance of this attitude of the union, takes advantage of it to cause these members of a rival union to be discharged.

The sole reason for the refusal by the union under the closed shop contract to take these people into membership was the factthat they all belonged to a rival organization.

The court majority found that this fact, coupled with the employer's knowledge of the fact, and that the closed shop was to be used, was a direct discrimination violative of Section 8(3) of the Wagner Act as it then read. I do not think the decision goes any further than that.

Mr. Justice Jackson: What regulation do you suggest it would support?

Mr. Thatcher: I suggest a regulation which would, as does the Massachusetts law, require a reasonable rule in admission when a union is operating under a closed shop relationship. Here I think the rule adopted, excluding arbitrarily

any person who was a member of a rival union, without regard to whether he now desired to join with the dmminant union, is the arbitrary one. Certainly it is not the usual union rule. Certainly unions do not take that position under close shop contracts. Or, of course, each time a union would win

c14 an election there would be mass discharges.

Mr. Justice Jackson: Does the American Federation seriously suggest that there should be regulation by law of th internal conduct of the unions?

Mr. Thatcher: No, Your Honor, except to this extent: that when a union does operate under a closed shop contract, we do realize that there is a resppnsibility there not to be arbitrary in adding membership or in expulsions.

Mr. Justice Jackson: I would suggest that a regulation means that the Government, or some agency thereof would supervise the union admission policy, and I cannot think of a thing that would be more fatal to the union movement than to let somebody outside do that.

Mr. Thatcher: Not necessarily. There already is an advanced body of common law, under which state courts have intervened in those matters where the expulsion was arbitrary, without due process. For instance, there are many cases along that line. I suggest that Your Honor examine the Massachusetts statute as an example of what might be done. Labor has not made any test case out of the Massachusetts statute, which

does attempt, where there is a closed shop relationship, to establish a rule of reason as to admissions. That, I think, would reach most if not all of the abuses that are complained of here; not total prohibition.

Mr. Justice Black: May I ask you onequestion, Mr. Thatcher?

Mr. Thatcher: Yes, sir.

Mr. Justice Black: On the point you present, are there any significant distinctions, or differences between the laws of the different states here involved?

Mr. Thatcher: Yes, there is a vast difference. Those laws which totally and flatly and absolutely prohibit --

Mr. Justice Black: I am talking about these three laws.

Mr. Thatcher: These three laws?

Mr. Justice Black: So far as we are concerned, whether this is put in the garb of anti-monopoly or something else, you raise one single question, do you not: that they cannot prohibit a closed shop?

Mr. Thatcher: That is right, Your Honor. I see no distinction between these three statutes insofar as our constitutional objections to them go.

Mr. Justice Frankfurter: Does that carry over to statutes that are not before us in any of the other states?

Mr. Thatcher: Those that absolutely prohibit, yes. As I said, we have various types of regulations.

Mr. Justice Frankfurter: How many of these statutes prohibit?

Mr. Thatcher: I think there are 14 or 15 which flatly prohibit.

Mr. Justice Frankfurter: I am talking about all those that are enumerated as of this time. Your answer to Justice Black applies to those?

Mr. Thatcher: That is right, Your Honor.

I have listened to the arguments from appellees here, and I still am not clear as to whether these laws do or do not prevent union members from refusing to work in a plant where a non-union member is employed. Counsel for North Carolina has just stated that in his state he believes that the law does not prohibit such a concerted withdrawal. If that is so, it seems to me it is simply quibbling to say that a union cannot stabilize its relationship if it has right to withdraw when non-union members appear, by agreeing with an employer that the employer shall not employ union members.

It seems rather ridiculous to say the union can, each time the non-union member appears at the plant, strike, leave the employment, and remedy the situation in that way, but not put in a formal form, a recognition to withdraw employment --

Mr. Justice Reed: Have you presented any question here that revolves around a prohibition by any one of the states of the right to strike for a closed shop or anything else?

Mr. Thatcher: That is not directly involved in these cases, Your Honor.

Mr. Justice Reed: Yours is a single issue, is it not: can they constitutionally prohibit a closed shop?

Mr. Thatcher: Or any arrangement approaching the closed shop. For instance, in our Arizona case we have a situation where the employer, the Arizona State Federation of Labor, operating the union, refuses to employ non-union printers. And there, the state has threatened that employer with crimina and civil prosecution.

Mr. Justice Reed: For refusing to employ a non-union man?

Mr. Thatcher: For refusing to employ a non-union man.

Mr. Justice Reed: That gets back to the question, does it not, of whether the state can constitutionally bar the closed shop?

Mr. Thatcher: It gets back to that. But inherent in that, I think necessarily inherent in that, is the right of union members to refuse to work with non-union members. Because that, as we know, is the heart of the closed shop relationship. That is the genesis of the closed shop relationship: the refusal of union men to work with non-union men, non-union employees. That is the heart of the closed shop relationship, and that simply cannot be gotten around. It is like saying you can have a right to distribute leaflets, but you

cannot make a contract to have those leaflets printed. That is exactly what we have involved here by a prohibition on the contract. That is merely the formalization of the right. The right itself is the right to refuse to work with non-union employees,and that is what we are complaining about here. I do not think it makes any difference that we do not have a --

Mr. Justice Black: Do either of these statutes prohibit an employee from refusing to work with a non-union employee?

Mr. Thatcher: I think it does.

Mr. Justice Black: Which one?

Mr. Thatcher: I think all three of them do.

Mr. Justice Black: Where?

Mr. Thatcher: If you will turn to pages 4 and 5 of our brief, the statutes are set forth.

Mr. Justice Black: Which statutes make it unlawful for a union man to refuse to work with a non-unionman?

Mr. Thatcher: Not expressly. It says this, though -- This has no reference to a contract, now. It is a North Carolina statute. It is page 3 of the brief, Section 3. It says:

> "No person shall be required by an employer to become or remain a member of any labor union or labor organization as a condition of employment* * *."

Now, that is a pretty flat prohibition, regardless of

contract.

Obviously, the minute we exercise our right to withdraw employment because of the presence of non-union men, and the employer acquiesces in that, he is violating Section 3. I think it is obvious that the contract need not be involved.

Mr. Justice Black: That simply says that an employer shall not hire a man because he is a union man or hire him because he is a non-union man, and discharge him for that reason.

Mr. Thatcher: In other words, it is the same as saying that we have a right to do something, to withdraw our employment, but we do not have the right to achieve the purpose of the withdrawal. That, again, is quibbling. I think if we have that right to withdraw employment in protest over the employment of non-union men, we certainly have a right to expect the employer to remedy the situation. And this section 3 prohibits flatly that remedy.

I see my time is up. Thank you.

(Whereupon, at 2:15 p.m. oral argument in the above entitled matter was closed.)

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