

Supreme Court of the United States

OCTOBER TERM- 1968

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JOHN F. DAVIS, CLERK

In the Matter of:

Brotherhood of Railroad Trainmen,
An Unincorporated Association, et al.,

Petitioners,

v.

John P. O'Connell, et al.

Docket No. 158

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Place Washington, D. C.

Date January 14, 1969

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C O N T E N T S

ORAL ARGUMENT OF:

P A G E

Arnold B. Elkind, Esq. on behalf of Petitioners

2

Lee Leibik, Esq. on behalf of Respondents

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 October Term, 1968

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4 Brotherhood of Railroad Trainmen,
5 an Unincorporated Association, et al.,

6 Petitioners,

7 v.

8 John P. O'Connell, et al.,

9 Respondents.
10 - - - - -x

No. 158

11 Washington, D. C.

12 Tuesday, January 14, 1969

13 The above-entitled matter came on for argument at
14 1:10 p.m.

15 BEFORE:

16 EARL WARREN, Chief Justice
17 HUGO L. BLACK, Associate Justice
18 WILLIAM I. DOUGLAS, Associate Justice
19 JOHN M. HARLAN, Associate Justice
20 WILLIAM J. BRENNAN, JR., Associate Justice
21 POTTER STEWART, Associate Justice
22 BYRON R. WHITE, Associate Justice
23 ABE FORTAS, Associate Justice
24 THURGOOD MARSHALL, Associate Justice

25 APPEARANCES:

26 ARNOLD B. ELKIND, Esq.
27 122 East 42nd Street
28 New York, New York
29 Counsel for Petitioners

30 LEE LEIBIK, Esq.
31 343 South Dearborn Street
32 Chicago, Illinois
33 Counsel for Respondents
34 - - -

1 P R O C E E D I N G S

2 MR. CHIEF JUSTICE WARREN: No. 158, Brotherhood
3 of Railroad Trainmen, et al., Petitioners versus John P.
4 O'Connell, et al.

5 Mr. Elkind.

6 ORAL ARGUMENT OF ARNOLD B. ELKIND, ESQ.

7 ON BEHALF OF PETITIONERS

8 MR. ELKIND: May it please the Court, Chief Justice
9 Warren: If the Court will indulge me by looking at the
10 title of the proceedings before the Court, there are some
11 matters which it is incumbent upon me to call to the attention
12 of the Court since they may, in the Court's mind, be relevant
13 issue of Constitutional power to hear argument in the case
14 or at least to decide the case.

15 The title reads: "Brotherhood of Railroad Trainmen,
16 an Unincorporated Association". That should be correctly
17 stated in terms of contemporary events. The United Transporta-
18 tion Union, an Unincorporated Association, and reading down
19 through the respondents, the Court will find that the Switch-
20 men's Union of North America, AFL-CIO, is a respondent in the
21 original proceedings.

22 Also, that the Order of Railway Conductors and
23 Brakemen are respondents. Those two responding unions have
24 now merged with the Brotherhood of Railroad Trainmen ---

25 Q Well, is there a case here, then?

1 A I wish that there were because ---

2 Q How can there be? This has to do with member-
3 ship and now they are all members of the same union.

4 A That is correct, Your Honor.

5 Q Is there a case here in Court?

6 A I would like to address myself to the -- I don't
7 want to say yes, but there is a serious question -- but I
8 don't want to say no.

9 Q Do I understand that the merger -- before there
10 were four unions ---

11 A There are now four unions, yes.

12 Q What is the surviving ---

13 A The other union of the engineers. The United
14 Transportation Union.

15 Q Now, they are all members of the same union.

16 A The four are.

17 Q The four are. Now we have a fight here whether ---

18 A And the engineers union, the only union that
19 is not a part of the UTU has filed a brief amicus curiae
20 with the position that ---

21 Q No, but as to the unions before us, the issue,
22 as I understood it, was whether it satisfied the requirement
23 of the union shop clause according to the members of the
24 Switchmen rather than the Railroad Trainmen?

25 A That was the question.

1 Q That was the question. And now the situation
2 is that one of them was formerly a Switchman and one of them
3 was formerly a Railroad Trainmen, but now are members of the
4 same union. How can there be an issue here?

5 A That is ---

6 Q Did anybody get fired for not joining the union?
7 Did anybody have to join the union that didn't want to?

8 A No, but the union, and in agreement with the
9 Erie Lackawanna Railroad, and there is in existence a judgment
10 in the U. S. District Court affirmed through the court of
11 appeals which holds that agreement to be void, invalid and
12 of no effect.

13 Q This is a Federal case, isn't it?

14 A It is.

15 Q And if it is moved, of course, we wipe out
16 everything -- the whole slate is wiped out clean all the way
17 back to the beginning.

18 A Including the original judgment.

19 Q Everything.

20 But you still have the same -- I suppose that the
21 fourth union is Firemen and Engineers?

22 A They are the fourth, yes.

23 Q Yes. And the Firemen and the Engineers have
24 a little thing going on between them, don't they?

25 A That is right, sir.

1 Q But they are not here.

2 A No, they filed briefs ---

3 Q No, but this union, this surviving union, has
4 this issue still a large issue with the engineers.

5 A That is correct.

6 Q Because this surviving union has firemen and
7 enginemen in it.

8 A Right.

9 Q And they would like to enforce the agreement
10 they had with the Erie Lackawanna with respect to the engineers.

11 A We wouldn't.

12 Q But the engineers are not part of the issue.

13 A They are not.

14 Q I notice you filed just a few days ago telling
15 us about these events. Has the respondent replied to your
16 filing?

17 A No, perhaps it would be appropriate if he
18 were heard. I don't know quite what his position would be
19 but perhaps the Court would want to know, preliminarily, what
20 Mr. Leibik's position is here.

21 Q Well, is this a suit for damages?

22 A There was a suit for damages, but there were no
23 damages.

24 Q What was the claim for damages based on?

25 A Well, there were none entered. The judgment

1 does not provide for any damages in any event.

2 Q Mr. Elkind, doesn't the case of controversy
3 requirement mean that there has got to be a controversy between
4 litigants before the Court?

5 A That is why I call the matter to the Court's
6 attention.

7 Q Yes. Well if you hadn't, it would have been
8 called to your attention.

9 A The only point I would like to make, in addition
10 to those that have been averted to by the Court on this
11 Constitutional question, is that we have this strange situation
12 in the Railway Labor Act that a railroad will be subject to
13 a fine or a criminal penalty if they enter into this kind of
14 an agreement and it was approximately 15 years, as far as I
15 can make out, before a strict union ship agreement was
16 finally worked out between labor and management.

17 Now, here we are on the very eve of having the
18 issue adjudicated. Apparently, we have lost our adversary
19 position. There is nobody here, as far as I know, to argue
20 on the other side unless Mr. Leibik, who appears here for the
21 respondent, is appearing for them and unless he claims that
22 they have an individual right not to pay the dues under the
23 union shop agreement that was made here. I don't know whether
24 that is his position here or not.

25 Q What do you argue to us -- that this is or is

not a case of controversy within the constitution?

A My clients, the UTU and the Engineers union, all the five operating unions that are affected by this agreement, would like this issue to be resolved.

That is the reason why I am here. They would like to have answer that the only reason why there should be any deviation from a strict union shop is to accommodate the realities of intercraft transfers so that the only appropriate situation before such a provision would be where there is both an engineers contract on the property and a UTU contract, and in that situation we would like to see the intercraft mobility accommodated.

Q I am sure that is true, but, as a legal proposition, what do you argue to us, that it is or is not a case of controversy?

A Well, I would say that there is not -- I would have to admit that, technically speaking, there does not appear to be a controversy. I have not heard anyone arguing on behalf of the other side and that, by my standards, is basic to a controversy.

Q But you suggest that maybe counsel for the other side would state his position on this particular matter. Would you mind doing it?

ORAL ARGUMENT OF LEE LEIBIK, ESQ.

ON BEHALF OF RESPONDENTS

MR. LEIBIK: Mr. Chief Justice, and may it please the Court: As of January 1, 1969, we have no independent client having any continuing interest in this litigation. There are no damage claims pending.

We received injunctive relief prior to the effective date of the agreements here in question.

We would ask this Court to consider the matter on the record and on the briefs submitted.

Q Well, but what is your position as to whether there is a case of controversy here within our jurisdiction?

A We represent the United Transportation Union, because the Order of Railway Conductors and Brakemen and the Switchmen's Union of North America has now been merged into the United Transportation Union. We do not believe there is a judicious controversy before this Court.

Q Where does this man, John P. O'Connell, come out? You represent him.

A Yes. They have no continuing interests, simply because there are no damages alleged in the complaint on behalf of any individual. There are no damages incurred, of course, because we did receive injunctive release prior to the effective date of this agreement.

Q It would appear that both of you agree that

1 there is not a case of controversy here.

2 MR. ELKIND: I might say this, Your Honor, that
3 in the next case that is to be heard, which arose from the 7th
4 Circuit, there is a variation in the fact pattern in that it is
5 claimed, as I understand it, that there is a damage claim
6 outstanding and that, therefore, the Court may very well find
7 that there is a justiciable controversy in that other case.

8 Q In the other case.

9 A So that we could, perhaps, get to the main issue
10 in the 7th Circuit case. But as the matter stands now, I
11 assume that if the case is treated as moot that the original
12 judgment would be vacated in the district court, in any event.

13 Q And does counsel agree to that, too?

14 MR. LEIBIK: Yes. Yes, we do.

15 Q Very well, the matter will be submitted, then.

16 (Whereupon, at 1:20 p.m. the hearing in the
17 above-entitled matter was concluded.)

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