# Supreme Court of the United States



OCTOBER TERM, 1969

In the Matter of:

THE BOYS MARKETS, INC.,

Petitioner;

vs.

RETAIL CLERK'S UNION, LOCAL 770,

Respondent.

Docket No. 768



Pt. 1



Place Washington, D. C.

Date April 21, 1970

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

C O N T E N T S



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Washington, D.C.
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The above-entitled matter came on for argument at 1:31 p.m.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice

APPEARANCES:

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: Next case on for argument is No. 768, The Boys Market against Retail Clerks Union. Mr. McLaughlin, you may proceed whenever you are ready.

ARGUMENT OF JOSEPH M. MCLAUGHLIN

ON BEHALF OF PETITIONER

MR. MCLAUGHLIN: Mr. Chief Justice; may it please the Court:

This case presents an issue which this Court faced 8 years ago in Sinclair Refining Company vs. Atkinson. The question is again here today, as well as an additional question or two that was not present in Sinclair.

The issue, basically, is whether federal courts have jurisdiction, under Section 301 of the Labor Management Relations Act of 1947, to enjoin strikes and work stoppages by labor organizations in violation of their premises contained in their labor agreements not to engage in strikes or work stoppages during the term of the labor agreement and to submit such disputes to arbitration.

This involves the question as to whether the Norris-LaGuardia Act should be accommodated to Section 301 and held not to bar the issuance of injunctions against strikes in breach of a promise to arbitrate and not to strike.

So the continuing validity of this Court's decision in Sinclair is squarely at issue here today.

Also, there is a subsidiary question, and that relates to the continued vitality of state court injunctions in the federal court after removal under Avco. That is assuming that this Court finds that Sinclair was rightly decided.

The factual background is simple. The petitioner and respondent, at all times material hereto, were parties to a collective bargaining agreement. Now that agreement provided, in pertinent part, that all disputes involving in any way the interpretation and application of the agreement shall be submitted to arbitration.

It further contained a specific agreement that there would be no strikes, cessations of work, picketing, boycotts or lockouts during the term of the contract.

It contained yet another specific provision, namely, that matters subject to the arbitration procedure should be settled and resolved by that established procedure.

The employer operates a chain of some 35 super markets. On a particular day in 1969 the employer was utilizing some non-bargaining unit personnel to stock a frozen food case. A union business agent observed this and objected, demanded that the employer cease.

The employer, believing that it was not in violation of the contract, refused. The union called a strike. All the employees left the store. Picketing commenced. The

customers were told that the store is closed, there is no service. Pickets carried signs saying, "Local 770. This store on strike. Please respect our picket lines."

The employer demanded arbitration. The union refused and continued to picket. The employer went to the Superior Court of the County of Los Angeles and obtained a temporary restraining order and also an order to show cause where a preliminary injunction was issued.

Now in connection with this state court procedure, union counsel was notified as provided by local court rule. After argument in chambers and consideration of the verified complaints and the affidavits and the like, the order was issued.

Now the temporary restraining order enjoined the work stoppage. The union responded promply by removing the case to the federal court, and in the federal court, filed a motion to dissolve the temporary restraining order.

In opposition, the employer filed in the federal court a motion for an order compelling arbitration, for an order requiring specific performance of the agreement to arbitrate and an application for a preliminary injunction against the strike.

Now the district judge was well aware of Avco and was well aware of this Court's decision in Sinclair. After consideration of the arguments of the parties and the various

documents submitted, he denied the union's motion to cross the state court injunction. He granted the employer's motion for an order compelling arbitration and enjoining the work stoppage. The union appealed to the Ninth Ciruit Court of Appeals, which reversed the district court on the ground of Sinclair.

Your Honors, the underlying premise of the trilogy in the Lincoln Mills of the law which this Court has developed under Section 301 is that arbitration is the most favorable solution, the most feasible solution, to industrial workers.

Adjudication on the merits is to be substituted for muscle. This Court has said that the no-strike agreement is the quid pro quo for the employer's agreement to arbitrate.

Now, if unions are free to strike and the employer is bound to arbitrate, this does not only mean that the employer does not receive the benefit of his bargain -- which is really about the only thing an employer gets in the labor agreement -- but also a most serious imbalance results.

This Court has said that arbitration is the kingpin of the federal labor policy under Section 301. Well, the king-pin is destroyed by the strike in breach of contract where the union is obligated to arbitrate the underlying ---

Q Are you asking us to overrule the Sinclair Case?

A Yes, Your Honor. I am.

Q When was it decided?

A In 1962, Your Honor.

Q Is it a statutory decision?

A Your Honor, it was the decision of this Court ---

Q Was it based on a statute?

A Yes, sir.

Q Nothing but a statute? Has it been presented to Congress for changes?

A Your Honor, in Sinclair this Court ---

Q Are you trying to get the dissent in that case of 1962 reinstated as the law today under the statute?

A That is correct, sir, yes. Because I believe the dissent was correct. The decision of 1962 is simply out of harmony with the congressional policy which this Court has found in Section 301; that is that the federal courts under Section 301 are to develop a body of federal labor law. And, as I pointed out before, arbitration has been declared to be the king pin of that policy.

Now the objection that the Norris-LaGuardia Act forbids what almost every commentator agrees is necessary and desirable is simply not sound. Because you can accommodate Section 301 and the Norris-LaGuardia Act so as to give the fullest possible effect to the central purpose of both statutes.

The Court has done this before. It has done it in the field of anti-trust. Justice Frankfurter, writing for the Court, accommodated Norris-LaGuardia to the anti-trust laws in

the Hutcheson Case. In Chicago River this Court accommodated Section 301 with the Railway Labor Act. And, I submit that in Lincoln Mills this Court likewise accommodated the Norris-LaGuardia Act with Section 301.

Q Have you filed or joined in any request to Congress to change the statute as we construed it?

A No, Your Honor, neither I nor anyone I represent has approached the Congress on this matter, sir.

Now no viable distinction, it seems to me, can be made between the accommodation of Chicago River and the failure to accommodate in Sinclair with Section 301. The only distinction is that in Chicago River the arbitrator was the National Railroad Adjustment Board. And here, under Taft-Hartley Section 301, it is an arbitrator who is selected through the contractually agreed upon procedures.

I respectfully submit that the question that was asked, or the question rather that was stated, in the Court's opinion in Sinclair, was the wrong question. The opinion of the Court starts off stating the question as being whether Section 301, and I believe the phrase used, is "impliably repealed" Section 4 of the Norris-LaGuardia Act. I think the answer to that is, obviously, no.

I think the proper question -- I would respectfully suggest -- is a question as to whether the statutes should be accommodated to each other. And I think the answer there is

just as obvious, and it is yes.

The legislative history of Section 301 ---

Q I suppose that you would say that, as a threshhold matter, before a court could issue an injunction to enforce the no-strike clause, the court would have to pass on the arbitrability of the dispute?

A Well, obviously, Your Honor. And as this Court has pointed out, it is the function of the court to determine arbitrability.

Q And pass on the scope of the no-strike clause?

A That is, undoubtedly, the case, because ---

Q Are there any exceptions to it and things like that?

A I can't think of any at the moment, Your Honor.

Q What about an unfair labor practice strike?

A In an unfair labor practice strike, of course, that is something ---

Q So the court is going to end up doing a lot of the arbitrator's work just to get to the injunction question, aren't they?

A I don't think so, Your Honor, because, unless an agreement specifically confides the question of arbitrability to the arbitrator, it is the court's function to determine arbitrability. Now in determining arbitrability, you have to interpret the scope of the arbitration clause. And it is

not unusual in contracts for matters to be excepted from the scope of the arbitration clause.

Likewise, with respect to a no-strike clause, it seems to me ---

Q Is this contract, under which this dispute arose, still in effect?

A This particular contract expired, was replaced after a strike by a successor contract. The language of this section, and the language of the contract which would have anything to do with the issues before this Court, are identical. They haven't been changed. They are in force.

Q Nobody has to determine whether or not there is any contract about this?

A No, there is no issue in this case at all. Union counsel, for example, will not deny: 1) that there was a labor agreement. There certainly was. 2) The language of the no-strike clause is as clear as language can possibly be.

Q And the dispute was arbitrable?

A Yes, sir.

Q Now to get it in focus, what would happen if the employer locked out the employees and the union wanted a remedy, what are their alternatives? What are their remedies?

A Under this contract and under similar contracts, if the union business agent had come in the store and he had said, "You are improperly stocking the frozen food cases; it

is a violation," and the employer had said, "It is not, and you had better forget about it," and then the union business agent refused to, and then the employer locked the people out or something like that, then the union could have gone to court, under this contract and under the law as I think it is and should be, could have gone to court and could have obtained a restraining order against the employer. In fact, I would have stipulated ---

Q Doesn't Norris-LaGuardia forbid injunctions against both employers and unions?

A It most certainly does, sir. But I don't think that Norris-LaGuardia forbids ---

Q Well, I know your argument that it doesn't, but what is the present state of the law under Sinclair. Under Sinclair could the union get an injunction against the employer?

A No, sir.

Q So that, at least as of now, under Sinclair both the employer and union are in the same posture.

A Well, they are in the same posture with respect to getting an injunction, but they are not in the same posture with respect to the objectives of arbitration, with respect to what the real meaning of the situation is.

Q Let me strip it away then. Are they in the same posture in terms of the enforceability of the no-strike clause or the no-lockout clause?

A Legally speaking, in terms of their right to access to the court, or lack of right, they are in the same position, yes, sir.

Q So that if we overrule Sinclair, you would put them again in the same posture, but they each would have access to the injunctive power of the courts to compel arbitration?

A Absolutely, Your Honor.

Q Would that have been true when Sinclair was argued?

A Yes, sir, I believe so.

As I started to say, the legislative history of this statute doesn't indicate a congressional disapproval of this accommodation that we are suggesting here today. In Sinclair this Court read more into that legislative history than it can properly bear.

Justice Frankfurter, in his dissent in Lincoln Mills, I believe, said that the legislative history of Section 301 leaves us in the dark. In Lincoln Mills the majority opinion of this Court said that the legislative history of Section 301 was cloudy and confusing.

One thing Lincoln Mills did say about that legislative history, though, was that Congress was interested in promoting collective bargaining that ended with agreements not to strike. If Congress was interested in promoting collective bargaining

that ended with agreements not to strike, the enforcement of those agreements must be provided for so as to make them meaningful. Because one thing Congress, obviously, wasn't doing, it, obviously, wasn't engaging in an idle exercise to encourage people to make agreements which were meaningless in practical effect.

If arbitration is going to work, the federal scheme must permit the effectuation of labor policy in the field of arbitration by means of the injunction against the strike and breech of contract.

Now it has been suggested that this is not necessary. It has been suggested that there are other and alternative ways to handle this problem. For example, the remedy of damages has been suggested.

Well, damages as a remedy against a union, Your Honors -- if I can bring 15 years of intimate experience about it to bear -- damages against a union with whom an employer has a collective bargaining relationship are meaningless.

Q How about arbitrating and then enforcing the award?

A First of all, to arbitrate in the face of the strike is difficult. Secondly, a strike defeats the arbitrator's jurisdiction. Thirdly, a strike ---

Q Well, you wouldn't say an arbitrator didn't have jurisdiction?

A Jurisdiction, Your Honor, in the sense that his ability to consider the matter on the merits, to adjudicate the thing sanely and in a civilized fashion, is defeated, because, Your Honor, the employer in this case ---

Q The fact remains that you could arbitrate your dispute.

A Oh yes, but in this case, for example ---

Q If I may interrupt you -- you could arbitrate it if both parties agreed to arbitrate but not otherwise.

A That is right; that is another point.

Q Or you can get an order to arbitrate.

A That is my point; we should be able to get an ---

Q You can get an order to arbitrate.

A Yes, but at the same time ---

Q Then you can arbitrate, and then you can enforce the award. I take it that your opponents -- or am I wrong -- don't they concede that a court could issue an order enforcing an arbitration award, without violating Norris-LaGuardia?

A I don't know what their position would be with respect to that. I have three comments that I would like to make. First, with respect to what would has happened here: The dispute involved the propriety of the way a frozen food case was being stocked, a rather large frozen food case.

Now the collective bargaining relationship of these parties is made up of hundreds and thousands of disputes like

this over the years. If the employer in this case had to wait while somebody got an order to arbitrate and then had an arbitration hearing and then came back with an order -- and that leaves still unanswered, Your Honor, the question of the court's ability to specifically enforce the award of the arbitrator; that is a question; it came up in New Orleans Steamship and Philadelphia Marine -- in any event, my employer in this case -- it isn't worth it. He has lost the benefit of his bargain.

He can't have a store shut down, with an enormous overhead of a modern supermarket, for a period of 2 or 3 months while an arbitrator decides a dispute. It has defeated the jurisdiction of the arbitrator.

Q Let's take another situation. Suppose an employer discharges an employee and the union goes on a strike, do you think you should be able to enjoin the strike while the union arbitrates?

A Absolutely, Your Honor, and the reason for that is ---

Q Well, what do you think about putting the man back to work while you are arbitrating?

A Well, the point is that ---

Q You don't do that, do you?

A No, sir, we do not, and I don't think we should have to. Now I would be glad to explain why, if I may. The

reason is this: When the arbitrator renders his award and he says, for example, that the employee was wrongly discharged, that employee can be made whole; because he is awarded reinstatement; he is awarded back pay. Whatever happened can be quite readily remedied.

Now a strike in breach of contract is something of an entirely different order. It is not the same thing at all. So that is why, Your Honor, I don't think that there is an unequality as Your Honor -- at least to me -- seemed to be suggesting.

Q May I ask you a question, perhaps, drawing more on your own experience? What would you say was a fair estimate of what impact Sinclair has had during the 8 years on union-management relations? Is that a question you can throw any light on?

A I can throw some light on it from my own experience. I personally do not think -- at least in the areas where I have practiced -- that Sinclair has had much of an effect at all until Avco came along. But you see that was because, for example, in the Southern District of California -- which is now the Central and the Southern District -- the courts there refused to accept removed cases from the superior courts.

Now the gimick is, in combination Sinclair and Avco, you see, we remove the case from the superior court. And the anomaly of that is -- and Congress could never have intended

this -- that an employer actually ends up with lesser means of effectuating his rights and of the contract than he had before Section 301. And this, I don't think anyone could say, was intended.

Q May I ask you one question? Is there any difference in circumstance or conditions with reference to this case now and 8 years ago when it was decided, except that the members of the Court have changed and that the personality is different?

A Your Honor, I think a number of things have happened to change it. For example -- First of all, let me make it plain that I think the decision was wrong. And if I am correct, sir, if I may respectfully suggest, if it was wrong then, it is likely to be just as wrong today. Secondly, if I may say so ---

Q Is it anymore wrong now than it was then?

A I believe it is because of Avco.

Q Because of what?

A Because of this Court's decision in Avco. You see previously ---

Q In which case?

A In the Avco Case, Your Honor, concerning the right of removal from state courts to federal courts of Section 301 actions.

You see what actually happened was -- and this is

anomaly, if I may say so -- that here we have a situation where -- Now suppose that Your Honors don't agree with me and that Sinclair remains with continued vitality, then you put it together with Avoc, then we come up with this next question. All right, then this Court has to decide what effect does Norris-LaGuardia have on state courts. What is the effect upon an injunction issued by a state court after it has been removed to the federal court? Does Norris-LaGuardia command that that order be dissolved?

If not, then the anomalous situation arises of having Section 301, under which the federal court system was to create a body of federal law, of having results that have forced plaintiffs into state courts, where state courts will do the body of 301 business under Section 301.

And then the other side of it, if you say Norris-LaGuardia will require those injunctions to be dissolved, as I have said before, an employer has less ways of effectuating his agreement than he had before 301. That is not right.

Thirdly, if you say state courts are bound by Norris-LaGuardia -- and we know we can't say that from Norris-LaGuardia -- we would have to import that through an interpretation of Section 301.

Q What year was Avco decided?

A Avco, I believe, was 1969 or 1968, Your Honor. It is a relatively recent case.

Q Did I understand you to say that Sinclair presented no particular problems of consequence until it was combined with Avco?

A I think Sinclair probably created, or gave rise to serious problems of difficulties, for example, in the District of Colombia or in states where they have anti-injunction acts that might have been interpreted to not give this relief. I did not mean to say, sir, that Sinclair had not given rise to difficulties.

What I meant to say was that whatever difficulties Sinclair gave rise to, they have been terrifically increased with the decision in Avco.

Q I understand your strong feeling on this as grossly misinterpreted and we have misinterpreted the will of Congress, but has Congress yet made any complaint about it?

A To my knowledge, sir, I don't think that Congress has passed any resolutions or enacted any statutes that would indicate a complaint.

Q Do you think that might be the best place to go for people who feel that the will of Congress has been perverted? In statutory matters?

A Well, Your Honor, this Court has interpreted statutes in various ways. For example, if you take a look at the legislative history of Lincoln Mills -- as you most certainly have -- not Lincoln Mills but Section 301, we find in there

practically no mention of arbitration.

What I think happened here is that likewise ---

Q Where do you find it then, if it is not in the act?

A Well, I think the Court in interpreting the statute found it.

Q Do you think the Court added it to the statute?

A No, sir, I did not say that. I said that in interpreting the statute, the Court found it. But what I am saying is that in the legislative history of that statute, you don't find very much. And also, in looking at the wording of 301, you don't find too much. Now my point ---

Q What do you think about the position of the Court on cases, where you decided nothing but statutory questions, changing from time to time, not according to changed conditions, but because you change the membership of the Court?

A Well, sir, I don't know, and I can't agree that that is correct; that is, that your assumptions are correct.

Q Why?

A Mr. Justice Black, I am saying that I can't agree that there would be a change simply because the composition of the Court has changed.

Q Well, wouldn't that be it, if there are no differences?

A I said, Your Honor, that I think that the same Justices could, conceivably, have come to the conclusion -- and this Court has done this before -- come to the conclusion that it did something incorrectly some years ago and rectify it. I don't think there is anything unusual about that, either in our legal system in the United States or in the decisions of this Court.

Q It is not usually done 8 years after. Sometimes it is ---

A Your Honor, it has been done 8 and 80.

Q --- but it is not usually done on statutes just because of the Court change.

A Now another thing is that discipline is a means of controlling this. Sir, you can't fire your whole warehouse crew. I don't have enough time to dwell on these things. It is an illusion; it is a snare. Disciplining employees doesn't do any good, because you need them. You are in business to produce goods or to sell goods, as the case may be.

Next, they talk about quickie arbitrations. Quickie arbitrations are a misnomer. They are an illusion. The best illustration of that -- we have covered it in our reply brief -- is always to be found in the New Orleans Steamship Case, where they had a quickie arbitration procedure. The hearing lasted for 4 days, and the decision didn't come out until over 2

months later.

In summary ---

Q Do I understand that you are talking against arbitrations now? We might not have somewhat of the same language.

A No, Your Honor, you do not understand me, or if you do understand me to be saying that, you misunderstand me. What I am saying, sir, is that there has been a suggestion -- particularly in the brief of AFL-CIO amicus -- that perhaps a proper substitute would be the negotiations of so-called "quickie" arbitration provisions. And we have been at some pains in our reply brief to point out why this isn't so. And I was just in my argument passing by and adverting to that fact, sir.

Q I rather welcome it.

A Sinclair was wrongly decided; as I say, we think it should be reversed. I have pointed out what I think is really the thorny thicket; that, I mean, this business of really painting the Court and the profession and the law into a corner, if we continue to follow this path, because of the fact that we now have to decide -- if Sinclair remains viable -- we have to decide what are we going to do about removed state court injunctions. If we get by that, what are we going to do about the power of state courts to issue injunctions, particularly where, for some reason, they are not removed.

I would suggest that a proper accommodation of Norris-LaGuardia and Section 301 sanctions the injunction in this case. It is a vital part of Section 301's effectuation. I would say that the availability of the injunction is far more necessary to Section 301 than it is detrimental to Norris-LaGuardia.

Therefore, it is respectfully submitted that the judgment of the Court of Appeals for the Ninth Circuit should be reversed, with instructions to affirm the order of the District Court.

MR. CHIEF JUSTICE BURGER: You have 3 minutes left tomorrow morning for rebuttal, Counsel, and we will suspend now until tomorrow morning.

(Whereupon, at 3:00 p.m. the argument in the above-entitled matter recessed to reconvene the following day, April 22, 1970, at 10:15 a.m.)