# ORIGINAL



In the

# Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD

Petitioner,

vs.

NASH-FINCH COMPANY, d/b/a/ JACK AND JILL STORES

Respondent.

No. 70-93



Washington, D. C.
October 19, 1971

Pages 1 thru 44

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| NATIONAL LABOR RELATIONS BOARD, Petitioner, | |
| vs. | No. 70-93 |
| NASH-FINCH COMPANY, d/b/a/ JACK AND JILL STORES Respondent. | |

Washington, D. C.

Tuesday, October 19, 1971.

The above-entitled matter came on for argument at 10:46 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

LAWRENCE G. WALLACE, ESQ., Office of the Solicitor General, for Petitioner.

WILLIAM A. HARDING, ESQ., 300 N.B.E.A. Building, Lincoln, Nebraska, for the Respondent.

# C O N T E N T S

PROCEEDINGS

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 93, National Labor Relations Board against the Nash-Finch Company.

Mr. Wallace, you may proceed whenever you are ready.

ORAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.,

ON BEHALF OF THE PETITIONER

MR. WALLACE: Mr. Chief Justice, and may it please the Court:

In this case, the District Court on jurisdictional grounds dismissed a complaint filed by the National Labor Relations Board and denied the Board's motion for a preliminary injunction and the Court of Appeals affirmed the judgment in all respects.

There has been no decision here on the merits of the Board's claim and there have been no findings of fact on which a decision on the merits would ordinarily be predicated.

The decision was made on the complaint and on the motion for the injunction.

The complaint is set forth beginning at page 4 of the Appendix. In it the Board recites that unfair labor practice charges had been filed with the Board by the union which is appearing here as amicus, the Amalgamated Meat Cutters Union, against the respondent company, and that on

the basis of this charge a trial examiner of the Board had found that the company had violated the National Labor Relations Act in several respects: by wrongfully refusing to bargain with the union and by committing certain other unfair labor practices relating to the union's organizational campaign.

I should say, incidentally, that after the present suit was filed, as the briefs point out, the Board in ruling on the company's exceptions disagreed with the hearing examiner concerning the refusal to bargain, and held that the union had not established majority status. But the Board did agree that the company had committed certain other unfair labor practices and issued a cease and desist order with which the company has complied, and there is no question here about enforcement of the Board's order.

The complaint further recited that approximately one month after the issuance of the hearing examiner's decision employees of the company began to picket the company's stores and the company went into the State Court and obtained an injunction against the picketing.

A copy of the injunction was amended as an exhibit to the Board's complaint.

Q The issue in this case doesn't -- the resolution of the issue in this case, at least in your submission, doesn't really depend at all on the ultimate

outcome of anything in the Board's administrative proceedings, does it?

MR. WALLACE: That is correct, Your Honor.

This is strictly a question of whether there is juridction in the District Court to hear the Board's complaint for an injunction against enforcement of the State Court's injunction by the company.

Q As you say, the merits even on the complaint for injunction haven't been litigated and are not before us.

MR. WALLACE: That is our view. We have asked to have the case remanded for a hearing on the merits of the Board's complaint.

Only the jurisdictional question has been decided below. We don't think the case is right for adjudication on the merits of whether the injunction should issue. There have been no factual findings.

Q Mr. Wallace, would the hearing in District Court which you suggest merely go to whether or not the activities that have been enjoined are arguably protected or would you say the District Court could decide then and there whether they actually were protected or not?

MR. WALLACE: Well, that question is very closely related to the question that divided the Court in the Ariadne case in 397 U.S --

Q That's why I am asking it.

MR. WALLACE: Under the complaint, in accordance with the majority opinion in Ariadne the complaint was put in terms of the activities being arguably protected or arguably prohibited.

Q So that if it were -- so if you were in a position to be arguably protective, the District Court should enjoin the State Court proceeding.

MR. WALLACE: Well, we understand that to be the law under Garner --

Q Even though there is no way of getting the issue before the Board to see whether it is actually protected?

MR. WALLACE: Well, that's what we understand the law to be, Mr. Justice.

Q I just want to know.

MR. WALLACE: And there is no occasion at this stage of the present case to reach that issue because under either view taken in Ariadne we think the same disposition would be appropriate here.

Now in its prayer for relief, the Board was quite specific in stating that it wished to have enjoined the enforcement of those portions of the State Court injunction that were within the preempted area in the Board's view, and those portions are more specifically set out in the Board's motion for a preliminary injunction which is set

forth in the Appendix on pages 33 and 34 of your Appendix.

There is a quotation of portions of the injunction which the Board seeks to have the enforcement of enjoined. And there are several ellipses in the quoted portion, Numbered 1, 2 and 3.

The first occurs at the beginning of Part 2 and then Subparts (a) and (b) of Part 2 are omitted, and then there is another ellipsis in Part 3. These ellipses are those parts of the order referring to the blocking of egress or ingress to the premises of the company, to interference with the flow of traffic or to the stationing of more than two pickets at any one store owned by the company.

So there has been no attempt here to oust the State Court of jurisdiction or to entirely supersede the State Court's injunction. And nowhere in the prayer for relief is there any contention raised that the State statutes are unconstitutional under the First Amendment or under any other provision. There is no declaratory judgment about the constitutionality the State statutes sought, nor any broad injunction against enforcement of the State statutes.

Those issues are mooted in amicus briefs in this Court in the case with a suggestion that the abstention doctrine might come into play before a Federal Court should involve itself in that question. But the question has not been put before the District Court in the complaint or in the

motion for a preliminary injunction, and the question is not here as we see the case.

Q What about Younger against Harris sort of an approach or Atlantic Coastline?

MR. WALLACE: Well, we have emphasized in our brief that we think cases concerning private litigation between private parties stand aside from the issue here, which is the issue under the Leiter Minerals doctrine.

Q So if this were a private party trying to get the Federal Court injunction, the Younger case might well --

MR. WALLACE: Might well control--

Q Even though there is no State criminal statute involved?

MR. WALLACE: I don't believe the Younger case would be the most closely in point. I think the Richmond Brothers case would be more closely in point, but --

Q And the Mitchum case that's yet to be heard this year.

MR. WALLACE: I am unfamiliar with that case.

Q Is it common ground between you and your brother counsel on the other side that if the plaintiff here were the United States of America there would be no jurisdictional bar and that if the plaintiff were John Jones there would be a jurisdictional bar? And the plaintiff in fact is the National Labor Relations Board and that's what makes this

lawsuit.

MR. WALLACE: I think that's very accurately stated, Your Honor.

There is no dispute by anyone in this case that if this suit had been brought in the name of the United States the Leiter Minerals case would be controlling. And I think it is very difficult to read the Leiter Minerals case any other way.

Q I am sure that's conceded, at least in his brief, as I read it, by your brother counsel.

MR. WALLACE: That is my understanding. In fact, the only qualification of Leiter Minerals in this sense that's raised in the whole case is in our own brief, in which we point out that when the United States is suing not to protect the public interest but in pursuit only of a private interest, it has a duty to pursue, the Court has refused to extend the Leiter Minerals exception to that kind of case.

The present case isn't that kind of case and I don't think we need concern ourselves here with that kind of case. But that is the only qualification that has been raised in the briefs and the issue between us is whether the doctrine is more accurately characterized, as we like to characterize it, as the Governmental exception, to Section 2283, or whether it applies only when suit is brought in the name of the United States.

We do not rely on any of the express exceptions in Section 2(83). We find outselves unable to in face of the Court's holdings about the narrow scope of those exceptions.

Q In such cases as Richmond Brothers?

MR. WALLACE: In Richmond Brothers and, more recently, in the Atlantic Coastline case.

There has been no challenge before the Board concerning this picketing and the Board has clearly held that the filing of a State suit in good faith to invoke remedies under a State statute is not an unfair labor practice, and is not within the scope of the Board's jurisdiction to question.

So the issue comes down to whether the Leiter Minerals exception -- and I do want to point out --

Q The exceptions were argued --

MR. WALLACE: We did argue them, the Board argued them in both the District Court and the Court of Appeals but we've abandoned the argument in this Court. The argument was rejected. It was made as an alternative argument.

Now, I do want to point out that the holding of Leiter Minerals on this point seems to us clear and concise. It is set forth on page 23 of our brief and after the policies behind it are summarized by the Court the holding is stated really in the single part of the sentence that we have at the end of the quotation: The interpretation

excluding the United States from the coverage of the statute seems to us preferable in the context of healthy federal-state relations.

Immediately after that sentence in Leiter Minerals, a new paragraph begins with the words that the Court will then turn to the merits of the question. The question still remains whether the granting of an injunction was proper in the circumstances of this case, and any discussion in the opinion relating to the particular facts of Leiter followed that statement by the Court.

The interpretation of 2283 on the jurisdictional question was the simple interpretation that the United States is excluded from the coverage of the statute.

That interpretation has stood now unchanged by Congress for fourteen years.

Now it is, frankly, difficult for us to think of reasons why it should make a difference in terms of the purposes of Section 2283 or the rationale of any of these cases, why it should make a difference whether the suit is brought in the name of the United States or in the name of a particular agency.

A recent decision by the Court of Appeals for the Second Circuit seems to us to illustrate this very well. We referred in our brief, on page 25, Note 11, to some litigation that was then pending which has now been decided by both the

District Court and the Court of Appeals, a case called United States against City of New Haven. In that case, a State Court injunction had been obtained against the use of a particular runway in the New Haven Airport.

The Federal Aviation Administration, of course, has jurisdiction over the safety of airports and the provision of airport services and it is part of the Executive Branch of the Government, now a part of the Department of Transportation.

The Justice Department, in its behalf, filed suit in the Federal District Court to enjoin the enforcement of that State Court injunction, as having invaded an area within the province of the Federal regulatory scheme.

Q Mr. Wallace, is the Federal Aviation Administration in that respect different from the NLRB? It is the plaintiff in this action. There, I notice, it is United States versus --

MR. WALLACE: It is different in that it does not have statutory authority to bring suit in its own name. That is the difference. It's hard to see any other difference, as I am about to point out.

The suitwas brought and the District Court upheld that jurisdiction within Leiter Minerals and issued a preliminary injunction, and the Court of Appeals for the Second Circuit recently affirmed granting of the preliminary injunction in a case decided August 31, 1971, Docket Number

71-1669, still called the United States v. the City of New Haven.

Now it seems, for purposes of the statutory policy reflected in 2283, mere happenstance that the Federal Aviation Administration is not empowered to sue in its own name, sues in the name of the United States, yet other agencies which have very comparable responsibilities for the provision of services to the public, such as the Interstate Commerce Commission, the Federal Power Commission, the Federal Communications Commission, do have statutory authority to sue in their own name, would be implementing Federal policies in interference with Federal policies by bringing entirely comparable suits.

It's hard to think of any reason why there should be a difference in result on jurisdictional grounds under Section 2283.

Now this does not mean that a host of new cases, a large volume of additional litigation, would be opening up as a result of recognition of the scope of the Governmental exception.

It seems to us it was recognized as long ago as Bowles v. Willingham, for that matter, there had been establishment of it under the Office of Price Administration legislation.

It is true that the opinion in that case pointed to

statutory authority for the administrator to seek injunctions but that statutory authority did not specify that injunctions could be sought against the enforcement of State Court judgments. And it's really not significantly different from the statutory authority of any other agency to seek injunctions.

We have inquired of a number of agencies to determine what their experience has been in this field and most of them have replied that they cannot recall an instance in which they had to seek relief against a State Court judgment where they could not at least attempt to justify that relief within the rationale of the expressed exceptions in Section 2283. But several of them did mention to us that such cases could arise that would be very important to the administration of their statutes. And for that reason they are interested in the outcome of this litigation.

I'll cite just one instance: the Federal Trade Commission and the Equal Employment Opportunity Commission both pointed out to us that under certain statutory provisions they have an obligation to conduct investigations in secret and to keep the matters that they investigate confidential. And they would be concerned about possible disclosure of some of these matters in State Court proceedings and would be rather hard pressed to justify relief under the expressed exceptions to 2283 in such a circumstance. It hasn't yet arisen, but it could arise.

The Equal Employment Opportunity Commission points out its particular concern because of the statutory policy behind the confidentiality of their investigations, a policy of protecting complainants and witnesses against reprisal and intimidation and the like.

So there are some important policies involved here.

Q Mr. Wallace, could I ask you, in dealing with the Norris-LaGuardia Acts and the National Labor Relations Board, has the Board's right to get an injunction despite the Norris-LaGuardia Act rested on specific statutory exemption?

MR. WALLACE: I know of no specific statutory exemption. I didn't think the terms of the Norris-LaGuardia Act applied to the Board.

Q Well, I notice on page 41 of your brief, statutory provision, 'Upon the filing of any such petition" etcetera, "District Court shall have jurisdiction to grant such injunctive relief . . . notwithstanding any other provision of law." Doesn't that express --

MR. WALLACE: Well, that's in enforcing Board orders. This is not a proceeding brought under that provision.

Q I am just wondering. Aren't there comparable provisions. I don't remember them but I thought wherever the Board has been given authority to seek injunctive relief

there has usually been added something like this notwithstanding any other provision of law.

Q Now, if your position is correct, it wouldn't have been necessary at all to provide for that exemption from Norris-laGuardia, because Norris-LaGuardia doesn't apply to the United States at all.

MR. WALLACE: Well, that's an issue that I don't think need be reached in this case.

Q Well, it might have a lot to do with whether Congress intended Norris -- the Board to exercise the authority of the United States. If outside these specific areas where the Board can get injunctions, if outside that area Norris-LaGuardia would bar the injunction of the Board, then the Board isn't the United States.

MR. WALLACE: Of course, I think there is initially a serious question whether Norris-laGuardia would have any applicability to an injunction against just any enforcement of a State Court judgment, rather than an injunction that goes to the conduct of the --

Q Quite a labor dispute.

MR. WALLACE: Well, it is, but it's a very limited scope of an injunction and doesn't seem to me the kind of interference with the settlement of labor disputes that Norris-LaGuardia was concerned with. Indeed, this kind of injunction seems to us to further the policies of Norris-

LaGuardia, by preventing State Court interference with the peaceful settlement of labor disputes.

Well, I think one other statutory provision might be pointed out as an example of the immateriality even to Congress of this distinction, that is a provision of the Interstate Commerce Act which is -- the particular provision is -- entitled 49 of the Code, Section 16, Subsection 12, entitled, "Proceedings to Enforce Orders Other Then for Payment of Money."

And there the statute provides: if any carrier fails or neglects to obey any order of the Commission other than for the payment of money, while the order is in effect, the Interstate Commerce Commission or any party injured thereby, or the United States, by its Attorney General, may apply to any District Court of the United States for the enforcement of the order -- any District Court of competent jurisdiction.

That's just an example of Congress' attitude that its policies and its statutes are to be enforced by whoever has the litigating authority, in that case, and the alternative by the United States or by the Interstate Commerce Commission.

It's difficult for us to see the materiality of this distinction.

Now in the labor relations field, the question is of

perhaps greater significance and has produced a somewhat larger volume of litigation already, and the Board informs me that it gets about a dozen complaints a year, requests that it file suits of this type. It has on the average been filing less than one per year, partly, of course, because of doubt about the outcome of this issue but also because it selects these cases carefully and plans to continue to do so if it is successful in this litigation.

Which seems to us to point up the significant difference between suits brought by public authority to vindicate the important Federal policies reflected in the National Labor Relations Act and other statutes and private litigation which has been barred under 2283 and which was really the concern of Congress in enacting 2283 and its predecessors.

The difficulty in the enforcement of the policies of the Act that result from injunctions of the type issued by the State Court here we think are manifest, indeed the District judge himself spelled them out in a rather regretful paragraph in his opinion in which he said that the decision leads to a rather (inaud.)result and they have been rehearsed previously in opinions in this Court.

Now the question remains what alternatives would be open to the Board were it not able to secure relief in the fashion it's seeking here, at least to have its complaint

entertained, other than leaving the matter to private litigation entirely which seems unsatisfactory in light of its responsibilities. There are only two possibilities. One is to seek to intervene or to participate as amicus curiae in the State Court proceedings.

Whether it could intervene, since no order of the Board is at issue, would be highly questionable. If it could not participate as a party intervenor then whether an appeal would be taken would be out of its hands. In addition, even if it could participate, it would be subjected to the possible pitfalls of unfamiliar State procedure, the possible limitations of State discovery proceedings and other disadvantages in comparison with the Federal forum where Congress contemplated it would be doing its litigating.

The other possible alternative is the suggestion that was raised in the Court's opinion in Richmond Brothers that perhaps the filing of a State Court proceeding that interferes with the area preempted by the National Labor Relations Act might itself be an unfair labor practice.

The Board, as we have pointed out in our brief, has on careful consideration rejected this position. When a suit is brought in good faith in a State Court to invoke remedies provided for by State statute, and it seems to us that for the Board to hold that a good faith suit in such circumstances could be brought only at the risk of being held

to have committed an unfair labor practice, would be a far greater intrusion on the prerogatives of the State and the dignity of State procedures to prevent even the invoking in good faith of State remedies than is the settled interpretation as we understand it of Section 2283.

I would like to reserve the remainder of my time for rebutal.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Wallace.

Mr. Clerk.

MR. CLERK: Mr. Chief Justice, may it please the Court:

I move that William A. Harding be permitted to argue pro hac vice on behalf of Respondent, Nash-Finch Company, doing business as Jack and Jill Stores in this case.

He is a member of good standing of the Bar of Nebraska, but he has been a member for less than three years.

MR. CHIEF JUSTICE BURGER: Your motion is granted.

We will be glad to hear Mr. Harding.

ORAL ARGUMENT OF WILLIAM A. HARDING, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. HARDING: Mr. Chief Justice, Your Honors, may it please the Court:

This case is but another example of the continual failure of the Labor Board to acknowledge that the Congress meant what it said when it passed the anti-injunction statute

and noted that Federal District Courts do not have the power, indeed they are prohibited from enjoining State Court proceedings unless specifically in aid of their own jurisdiction in order to effectuate their own judgments, or where specifically provided for by Congress.

Of course, this prohibition and these exceptions are found in 28 U.S. Code 2283, and that is the heart and basis of this case.

Q Of course, this Court has already said that those words don't mean exactly what they say as in Leiter Minerals.

MR. HARDING: Yes, Your Honor, but that wasn't so much that they don't mean what they say as they haven't said enough.

Q That they haven't said enough, that there is another exception in addition to those specified in 2283?

MR. HARDING: Yes, Your Honor, and I would like to explore for this Court that United States exception that the Board talks about, as well as a few other reasons why we believe this Court should affirm the decisions of the lower courts in denying to the Board the relief it requests.

But before I do so, I would like to emphasize a few facts that the Board took care not to emphasize, and one that was incorrect.

First, the Board incorrectly noted in oral argument

that the employees of the Nash-Finch Company were striking in the summer of 1969. This is incorrect and the Board's complaint does not say that. The Board's complaint, Part 6, noted on page 5 of the Appendix, specifically notes that the union began picketing. And as noted in affidavits attached as an Appendix to our brief, in support of our petition in the State Court, clearly point out the pickets were not employees. Therefore, it was understandable that the company would not have easy access to the names or identity of those people and that the State Court therefore required that anyone that was being presumably paid by the union to come and picket would first come to the State Court, identify themselves, and submit to its jurisdiction.

So these were not employees. These were presumably paid union personnel that were conducting the picketing.

Secondly, and perhaps most importantly, the picketing in the instant case, is acknowledged and judicially has been determined as mass picketing.

On the one hand, we will have peaceful picketing and on the other end of the spectrum we have nonpeaceful picketing. In between the picketing that may be either or both is a type of picketing that most State Courts have passed statutes regarding, and which they refer to as mass picketing.

In implementing its duty under its State police

power to protect the rights of its citizens and to make the conclusion that they may not be hampered by any type of picketing that would prohibit ingress and egress or lead to violence, most States prohibit, as does Nebraska statute, the numbers of pickets that may be placed, and specifically states that they may not prohibit the ingress and egress.

The Nebraska statute has a few other factors in it, but suffice it to say that the affidavits which we submitted in the State Court which are set forth in Appendix to our brief, indicate that there was substantial blocking of ingress and egress by these non-employee pickets, that there were substantially more than the numbers allowed by the State statute. There were also some other areas of some threats to both customers of the store and store employees, but suffice it to say, Your Honors, the Board comes before this Court rather piously proclaiming this is peaceful picketing and it is not.

There is a judicial determination it is mass picketing and there is a world of difference, because if it is peaceful picketing only the company acknowledges that there is obviously at least an arguable, at least an arguable, conclusion that the picketing is therefore totally, completely governed by the National Labor Relations Act and the Board.

However, if it is mass picketing, there is a very substantial State interest involved under the State police

powers. And that's what we have at issue in this case, Your Honors, that State police power versus what the Board would ask this Court to do, which is to imply to it an exception on the basis of Federal preemption to that it may go into any Federal District Court, anywhere in the country, and get an injunction of any State implementing its police powers as regards mass picketing.

Now we also note in our brief, Your Honors, that it's true we've never had any holding on the merits, there has never been any findings of fact by the Federal District Court.

Unfortunately, we were not really in a position to be vitally concerned about this as we already had our judicial determination it was mass picketing. We thought that took care of the issue.

The Board was the moving party in the Federal District Court, and made no effort to place any of those facts before the Court and, as noted in oral argument, the case was determined on our motion to dismiss, and it was affirmed by the Eighth Circuit.

But there are Police Department, Fire Department records, records of the State Department of Agriculture, which we note in our brief that we believe this Court could take judicial notice of which indicate that there were substantially other activities that could properly be used to

classify this picketing as violent.

Q May I ask, Mr. Harding, does any of this bear on the issue before us, namely, whether there was jurisdiction in the District Court to entertain this complaint?

MR. HARDING: No, Your Honor, as we know it. If the District Court was correct that it didn't have jurisdiction, it doesn't make a bit of difference.

Q I mean that the facts that you are telling me really don't bear on that question at all.

MR. HARDING: No, Your Honor, but the Board seems to think that they do, because the Board says that they should have an exception implied for them.

Notwithstanding the United States exception, their argument goes on to say, we feel that this Court on the basis of Federal preemption alone, an argument which was rejected by this Court both in the Richmond Brothers case and last year in Atlantic Coastline's, on the basis of preemption alone, should allow the Board or any other Federal agency to go into District Court.

We don't agree with that and we don't believe this Court does.

Q But I understood you to concede a few minutes ago, Mr. Harding, that if this record showed peaceful picketing you would be out of Court.

MR. HARDING: Yes, Your Honor, if it was peaceful

picketing, we wouldn't have gone into State Court.

Q So to that extent, the facts are irrelevant to your argument in that respect, are they not?

MR. HARDING: Only to the extent, Your Honor, that the Board has made this as the basis of its argument before this Court as to why it should have had jurisdiction given to the District Court and in our counterargument to that fact we are only noting that if this Court should consider this preemption argument of the Board that it should also consider there are a few other things than just peaceful picketing.

But we believe the issue can be disposed of by the judicial determination in the State Court that this was mass picketing, not peaceful picketing.

Q Yes, but wouldn't you be making the same 2283 argument here even if there was nothing involved in the State Court except peaceful picketing, that the Federal Court would have no power under 2283 to enjoin a State Court proceeding?

MR. HARDING: Perhaps, Your Honor, but --

Q Oh, perhaps?

MR. HARDING: If there was only peaceful picketing, I doubt if we'd be here.

Q That isn't the point.

MR. HARDING: I realize that. That's why I say perhaps.

Q It just so happens that the Court -- that the State Court -- said even if you limit picketing to two people you can't hand out any handbills. Now there is just as clear an issue in this case. Would you say the Federal Court could have -- in this case -- could have enjoined the State Court from enforcing that particular provision in its injunction, despite 2283?

MR. HARDING: If there was only that issue involved, Your Honor?

Q Yes.

MR. HARDING: If there was only that issue involved, I think the Federal District Court might have felt itself quite bothered --

Q I don't know about Federal District Court. I want to know what your position is on --

MR. HARDING: My position is, Your Honor, it should have been litigated in the State Courts.

Q So 2283 would bar the Federal Court in any circumstance?

MR. HARDING: Yes, Your Honor.

Q I would think that would be your answer.

MR. HARDING: I don't believe that that is really properly before this Court though in further answer to your question --

Q It isn't? Well, I would think it would be

before the Court as to whether the -- the issue is whether the Federal Court had power to enjoin any part of the State Court injunction.

MR. HARDING: Well, the reason I say I don't believe it's properly before this Court is because the Board can't adequately get around the limitations of 2283, and it could have and should have proceeded in the State Court, and could have amply taken care of its problems there.

There are a number of reasons why we believe that this Court should conclude that the Lower Court was correct in what it did.

I'd like to first draw the Court's attention to the statutory framework in which Section 2283 appeared to the District Court.

As has been noted by this Court in previous questions, the Norris-LaGuardia Act indicates that Federal District Courts are not encouraged to grant injunctive relief in labor matters. 29 U.S. Code, Sections 101 and 104 indicate that they should not. In fact Sections 107 and 109 indicate that they should make detailed findings of fact before they would ever enter such an area of granting injunctive relief.

But notwithstanding that fact, 29 U.S. Code, Section 160, usually referred to as Sections 10(j) and 10(l) of the Act, gives to the Labor Board the power to go in in certain situations, into Federal District Court and obtain injunctive

relief if they feel it's an extraordinary circumstance where they should exercise that power and go in and get that injunction.

In addition to that, of course, we have 28 U.S. Code 2283, which has been law in some form since 1793. And I submit to the Court, Your Honors, that the distinction is somewhat more basic than that. Even as has been noted in the amicus brief by the National Chamber of Commerce and in our brief, that this has been a longstanding implementation of the notion in Congress that there should and must be a dual Court system in this country.

I direct Your Honors' attention to the Federalists Papers, which we note in our brief, by Mr. Madison, wherein he indicates that there is an even deeper division than that because when the people of this country, who are the sovereign, gave to the new Federal Government its power to do what they allowed it to do, that there was considerable concern over what that Federal Government might do to the State Governments.

Mr. Madison notes quite clearly in Number 46 that if there is an area where a State Court infringes on an area that the Federal Government thinks is unfriendly to it, that notwithstanding that fact, the States must clearly have the advantage. And the reason in that is because the States were giving the power to the Federal Government and that they must

maintain that advantage.

So we would say that Section 2283 came before the District Court with the very, very basic distinction between the Federal and the State Court judicial systems.

Based upon that, the State action in giving the company relief and redress under the State Mass Picketing Statute, is certainly not for this Court on the grounds that that is not within their power, for as noted in numerous decisions before this Court as set out in our brief on page 13, this Court has many times noted that regulation of mass picketing by State Courts and by State statutes is clearly and completely within the province of the State police power.

It was upon this statutory framework then that this matter reached the Federal District Court. At that point, the Board raised its two arguments that it, number one, should be considered the United States for the purposes of this action and get around Section 2283 and that, two, it could be considered to get around Section 2283 simply because it had been established by the Congress, I suppose. They base a very large Federal preemption argument on this issue.

Q Which of our cases emphasize mass picketing as you seem to have --

MR. HARDING: Well, Your Honor, a number of cases. The Wisconsin cases, Yale and Bradley cases talked about that.

Q Did Atlantic Coastline deal with mass

picketing?

MR. HARDING: I am not aware that it did, Your Honor.

This Court noted in the City of El Paso case in 1965 about the broad powers of State police powers that States should be granted wide discretion in determining how to exercise those State police powers. And Mr. Justice Reed, in Ritters V. Cafe in 1942, noted specifically that there was no serious question that States had the power to place a good deal of regulation on mass picketing, to regulate the numbers and to regulate the blocking of ingress and egress, etcetera.

The basic argument that the Labor Board brings before this Court that it should be considered the United States, seems to have been decided by this Court's decision in the Matheson case, 344 U.S., wherein it was noted that a debt, and in that situation a back pay proceeding that was owed to the Labor Board was not entitled to preference as a debt owed to the United States would be.

Nevertheless, this case is still before the Court because the Board maintains that it should be considered the United States because there is no reason to consider that it would not be.

But, Your Honors, of course, it is recognized that the Federal Government is a government of limited powers and it is also a government of specific powers. The Labor Board

was established not to be the United States for all intents and purposes but was established to be a specific agency of the Government, to enforce a specific statute under specific policy directives of the Congress.

I don't believe that the Congress intended to make the Labor Board into what might be referred to as a Frankenstein's monster in that it could go across the entire country doing what it liked and considering that it had the powers, immunities and privileges of the United States.

Indeed, this Court has noted previously in cases very similar that agencies of the United States Government, as noted in the Menihan case, which we note in our brief on page 20 and page 23, that this Court has previously concluded that agencies of the United States are not to be considered to have and to possess the powers, privileges and immunities of the United States unless the Congress clearly grants that power to them.

Your Honors, the Board points to no specific statutory authority for their claim that they may be considered the United States for the purposes of this action.

Indeed, all they want to do is circumvent another specific statutory provision, which is 2283. Yet they point to no specific statute granting them that power.

They do point to what they refer to as implied exceptions under former Section 265.

In our brief, as we noted -- as this Court noted in the Richmond Brothers case, there is no need really to consider those implied exceptions because it's clear that the Congress did not intend for any implied exceptions to live beyond the enactment of Section 2283. But for argument's sake, it should be noted that the cases the Board relies upon are not really cases wherein there were judicially implied exceptions because there was in fact conflicting statutory authority.

In four of the cases the Board relies upon, that authority was granted by Section 205(c) of Emergency Price Control Act. The most noted of those cases is Bowles v. Willingham.

In fact, it's notable that approximately ten days ago the Government went down the street to argue in the District of Columbia Circuit and told Judge Leventhal that the Bowles v. Willingham case specifically gave the President the power to do what he is doing now in the wage-price control freeze because it was an emergency statute and they used Bowles as a basis for their case. Yet they come into this Court today and argue that the Bowles case is just a clear indication of the fact that any Government agency can be given the power to be the United States under the rather broad argument of Federal preemption, and make no mention of the fact that that was an emergency price control act. That was not a regulation statute as we would note in the general

sense of the word.

However, two additional cases cited by the Board in its brief specifically gave jurisdiction to Federal District Courts under Section 79(k) of the Public Utilities Holding Act.

The final case cited by the Board as a presumed exception under former Section 265 was given specific authority -- gave specific jurisdiction to the District Court under the Agricultural Marketing Act, Section 6.

So the Board comes before this Court not with implied judicial exceptions but with conflicting statutory authority under prior Section 265. And that, Your Honors, as was noted in the revisor's notes of Section 2283, was why the Congress passed Section 2283. They had to get their house in order and note specifically when jurisdiction was granted to a Federal District Court. And they took care of that by placing the first exception under Section 2283, the words: except where specifically authorized by Congress.

Now the Board is specifically authorized by Congress under Section 10(j) and 10(l) to seek and to obtain injunctive relief, but those sections do not apply to this case as the Board acknowledges.

We submit, Your Honors, that had the Congress intended to give the Board the power to get injunctive relief in other situations it would have said so. Every place where it has given the Board power, it has specified that power.

Especially, Your Honors, in the area of injunctive relief, which might be distinguished from rather more administrative powers which the Board notes in its brief that, of course, not all of the powers to implement that statute were given to the Board in the statute. Of course not. Not as far as administrative matters would be concerned.

But when it comes to an injunctive power, those powers have been specific in their implementation by the Congress and we would submit that since 10(j) and 10(l) do not apply to this case the Board has no statutory power to attempt to get the injunction that it seeks.

Now in addition, in oral argument, the Board notes what the Respondent will rely upon for another indication of why the Board should not be before this Court claiming to be the United States. 49 U.S. Code, Section 16, dealing with the powers of the ICC as the Board noted, specifically says that to implement those statutes either the ICC may do so, any aggrieved party or the United States.

It is fairly obvious that the Congress need not have said the ICC or United States if there was no difference. But the regulatory agencies of the Government are not parts of the Executive Branch of the Government. It is specifically noted in even the Government organizational manual put out by the Government Printing Office that there is a distinction between branches of the Executive Government and regulatory

agencies. In fact, there are 51 regulatory agencies, including the Labor Board, listed as administrative agencies.

Your Honors, this distinction was drawn by this Court some time ago in the case of Humphreys v. Executer wherein a Federal Trade Commission case involved power of the President to remove a member of that Commission.

Now this Court concluded that since the Federal Trade Commission was not an Executive Branch of the Government that therefore the President did not have that power, and in so doing clearly and carefully drew the distinction between Executive Branches of the Government, those branches that do not have the power to sue in their own name but must sue as the United States and are indeed to be considered the United States as opposed to administrative agencies, for example, the Federal Trade Commission.

And as was noted in oral argument by the Board, FAA in a case before the Second Circuit has sued under the name of the United States, but it is in fact an Executive Branch of the Government, and that is the significant difference that is not found in this case, because the Labor Board does sue in its own name but it is not the United States. It does not have all the privileges, powers immunities of the United States and it, therefore, may not come under this Court's decision in Leiter Minerals to remove itself from the prohibition of Section 2283.

An additional argument that the Board makes is that notwithstanding any argument that it might be considered the United States, it should be allowed to proceed in this case simply because it was established by the Congress, it has pre-empted the area of labor relations and that, therefore, it should be able to proceed against any State Court that gets into the area of labor relations in any degree, I would imagine.

That argument was advanced also in the Richmond Brothers case. Justice Frankfurter noted in that case that that argument must be rejected because simply because Federal statutes may have preempted an area, Section 2283 must be strictly construed, and that unless there is a specific act of Congress, unless it is in aid of that Court's jurisdiction or to effectuate the judgments of that Court, no Federal District Court may overlook the limitations of Section 2283.

Q Do you consider it limited solely to the Executive?

MR. HARDING: No, Your Honor, I would imagine that if the Congress would request the Attorney General to proceed for it they might do so in certain circumstances. I would imagine all branches of Government could.

Q Well, how do you account for the fact that the Solicitor General is here representing them?

MR. HARDING: Well, Your Honor, that is an internal

procedure the Government follows that I don't have any control over. I know there are several people at the Labor Board that would like to be here today but the Solicitor General is here.

The fact is, Your Honor, that we don't discount the fact that they are an agency of the Federal Government, that they have work of a Federal nature to do. What we do say, though, is that that work of a Federal nature to do has been specifically granted to them and at least as regards the injunctive power, the power that the Congress does not wish exercised by Federal District Courts in labor matters generally, that the Congress has been careful to only grant limited power to the Labor Board to proceed for injunctive relief. And that that power has not been given to the Board to circumvent the limitations of 2283.

From a practical standpoint, the argument of pre-emption by the Labor Board really attempts to get the cart before the horse, because what it tries to do is to get the merits of the case in before jurisdiction is initially granted. And this, of course, was why the District Court denied the jurisdictional claims of the Board. In fact, as we noted in our brief, later Mr. Justice Cardozo when he was deciding cases for the State of New York noted that rights exist and that they may be granted after jurisdiction has been found, but that rights in and of themselves may not confer

jurisdiction.

This is what the Board would seek to have this Court do.

There are additional practical reasons to conclude that the Labor Board should not properly be before this Court seeking to circumvent the limitations of Section 2283. They go beyond the system of dual courts that has long been established and that is because the Labor Board does not even exercise the power that it is granted under Sections 10(j) and 10(l), as we noted in our brief.

In over 75% of what it acknowledges to be meritorious cases, it does not seek to obtain injunctive relief.

It is rather anomalous then that the Board comes before this Court and urges this Court to comply and to judicially legislate a power that the Congress has not granted to it.

For all of these reasons then we urge this Court to again strictly construe Section 2283 to conclude that the Board may not on a basis of Federal preemption alone circumvent the limitations of Section 2283 and to affirm the lower Court.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Harding.

Mr. Wallace, you have two minutes left.

REBUTAL ARGUMENT OF LAWRENCE C. WALLACE, ESQ.,

ON BEHALF OF THE PETITIONER

MR. WALLACE: Thank you, Mr. Chief Justice.

I would just like to say a word or two about some of the cases relied on by the Respondent, particularly, Nathansen v. The National Labor Relations Board, in which this Court in construing the Bankruptcy Act decided that an award of back pay owing to the Labor Board while it was a debt owing to the Labor Board was functionally in the category of wages owing to workmen rather than a sum of money owing to the Treasury of the United States, and should accordingly be awarded the priority of wages rather than of debts owing to the United States for purposes of applying the Bankruptcy Act.

It's hard for me to think that any different result would have been reached in that case had the debt technically been owing to the United States but to be used for the same purpose.

The reasoning of the Court was that this was not a payment to go into the Federal Treasury.

Reconstruction Finance Corporation v. Menihan was a case in which the Court held that the corporation, distinguished from Federal agencies, which had statutory authority to sue and be sued like other corporations, should not come within the statutory provision exempting the United

States from interest payment in litigation, but the ordinary rules of litigation should apply.

The National Labor Relations Board and other Federal agencies were for years operating under the Federal provision exempting the United States from interest payments and were not paying interest in litigation. And it's only since the amendment of that provision with respect to all litigation by the United States that this practice has changed for the agencies in that respect.

Now if there is any further question about the Norris-LaGuardia Act in this matter, I am informed that the Board did brief the question of why the Norris-LaGuardia Act should not apply in this kind of case. It is either in the Capital Service case or in the Richmond Brothers, we don't recall which brief it was, but it was in one of those briefs.

Q Mr. Wallace, I don't know that I have come upon all of them, but there appear to be at least three sections, one at least in the original 35 act and two in the 1947 amendments, where Congress has conferred upon the Board authority to seek injunctive relief where it has added something notwithstanding any other provision of law or, I think, in the '35 act, notwithstanding the provisions of 101 to 115.

Now don't you think there is some significance in respect to whether Congress thought the Board might seek injunctive relief, in the fact that Congress at least in those

three instances expressly said notwithstanding any --

MR. WALLACE: Congress took that precaution and those provisions all relate to the Board's authority to seek relief --

Q How does this bear on the question before us?

MR. WALLACE: Well, I think the difference in this case and those provisions is that there the relief bears directly on the rights between the parties.

Q I don't suggest that isn't so, but might there not be an inference in the fact that at least three times Congress did this -- that Congress thought that except as it did it the Board was not to be considered as having authority to seek injunctive relief in Federal Courts?

MR. WALLACE: Well, it is hard to know what's behind a precautionary language of this kind --

Q We know they are really precautionary?

MR. WALLACE: Well, there is no specific reference to the Norris-LaGuardia Act.

Q There is a specific reference to the Norris-LaGuardia Act in the 1935 Act, specifically named.

Q Of course, the answer there might be that Leiter Minerals was not decided until 1957, and even the United Mine Workers case in 330 U.S., that was decided after 1935 too. So that might explain away the '35 reference, but it seems to me it is more difficult to explain away the '47

reference.

MR. WALLACE: Well, of course, the concern of the Norris-LaGuardia Act was with injunctions that would interest --

Q Well, these 1947 references are not to the Norris-LaGuardia Act. They say not withstanding any other provision of law.

Q And if the United States isn't covered by the Norris-LaGuardia Act and the agencies entitled to the exemption of the United States, there wouldn't have been any need for this sort of provision.

MR. WALLACE: Well, we need not argue that the United States is not at all subject to the Norris-LaGuardia Act --

Q Well, it's been so held

MR. WALLACE: -- or that the Board is not at all subject here, is what I should say, because the purpose of the Norris-LaGuardia Act was to prevent injunction that would interfere with the Board's activities, and that's exactly what the Board is trying to prevent in this case, interference with the Board's functions under the Act.

Q But it's the kind of injunction it's not specifically authorized to get under the provisions of the Act. It has to be implied at this time.

MR. WALLACE: Well, yes, we invoke Section 1337,

Title 28, for it.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Wallace.

Thank you, Mr. Harding.

The case is submitted.

(Whereupon at 11:45 a.m. the case was submitted.)