In the

Supreme Court of the United States

OLD DOMINION BRANCH NO. 496, NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO, ET AL.,

Appellants,

vs

HENRY M. AUSTIN, ET AL.,

Appellees.

Docket No. 72-1180

Washington, D.C.

November 14, 1973

Pages 1 thru 43

HOOVER REPORTING COMPANY, INC.

Official Reporters
Washington, D. C.
546-6666

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Appellants,	:	
v.	:	No. 72-1180
HENRY M. AUSTIN, ET AL.	:	
Appellees.	:	

Washington, D. C.
Wednesday, November 14, 1973

The above-entitled matter came on for argument at 11:48 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
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

MOZART G. RATNER, ESQ., 818-18th Street, N.W., Washington, D. C.; for the Appellants.

STEPHEN M. KAPRAL, ESQ., 4510 S. Laburnum Avenue, Richmond, Virginia; and

PARKER E. CHERRY, ESQ., 1012 Mutual Building, Richmond, Virginia; for the Appellees.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 72-1180, Old Dominion Branch No. 496, National Association of Letter Carriers, AFL-CIO, et al., v. Henry M. Austin, et al.

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

ORAL ARGUMENT OF MOZART G. RATNER, ESQ.,

ON BEHALF OF THE APPELLANTS

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

This case is here on appeal from a judgement of the Supreme Court of Virginia affirming three separate judgements of $55,000.00 each -- a nice figure of $165,000.00 in all -- against the Richmond branch of the National Association of Letter Carriers and the parent National Association. The three plaintiffs, beneficiaries of these judgements, are individual letter carriers who refused deliberately and willfully to join the union.

Because of that refusal, they were identified as "scabs" in the local branch's monthly newsletter to its members. And in one issue, the branch published a pejorative definition of "scab," popularly attributed to Jack London, followed by a list of "scabs," which named the nonmembers -- some fifteen of them, including the three plaintiffs.

At least since 1897, according to the CENTURY DIC-

TIONARY ENCYCLOPEDIA, which is quoted at page 51 of the Appendix, in labor parlance a "scab" is a workman who is not, or refuses to become a member of a labor union.

Q Was that definition furnished along with the other definition in this publication?

MR. RATNER: That definition was not printed, but the record is unequivocally clear that all of the plaintiffs and everyone else knew the reason they were being called "scabs" was. That they had been importuned and pleaded with and begged to join the union, and they refused willfully and deliberately to do so.

Q Mr. Ratner, that's twice you've used the word "willfully."

MR. RATNER: Yes.

Q Normally this connotes guilt. Are you using it in that frame of reference?

MR. RATNER: No. I have no meaning, no implication in that word in that context other than, they were not newly on the job, had not had a chance to be approached, had not had a chance to consider the problem -- they had made a deliberate choice, is all I meant to say.

Q Well, I think that is not the correct use of the word "willfully." I suggest that you --

MR. RATNER: I beg your pardon. I will change it. They had deliberately elected not to join the union.

Q Mr. Ratner, I don't suppose you found in the Dictionary any difinition of a "scab," and here I quote from page 72, I think, of the Appendix, as "a traitor to his God, his country, his family and his class."

MR. RATNER: Well, I was coming to that.

Q My question was, is it in the dictionary?

MR. RATNER: I don't suppose that the dictionaries wanted to print Jack London's definition as being part of the commonly accepted definition of a scab. Jack London was elaborating, in literary fashion, about what his conception of a scab was. No, it's not a literary dictionary definition. The "scab" is an artist's conception.

Q Did the publication identify that quotation as coming from Jack London?

MR. RATNER: The publication itself did not. In fact, the publication does. Page 52, I believe, of the record. Or maybe it's 74. In any event, immediately after the article itself appears. Page 77 appears the card from which the editor of the local paper derived the text of the article. That was published by the Richmond Trades Industrial Council. And that, defendent's Exhibit 5, clearly shows that "A Scab," by Jack London, well known author of "Call of the Wild," "Sea Wolf," etc., when, as your Honors will see, the local branch, in response to a question by plaintiff Austin, saying he didn't know what a "scab" was, published the London definition. It

said that some people seemed to be in a quandry as to what a "scab" is -- we offer the following. It did not say that it was the only definition; it did not say it was a dictionary definition; it said that it was a definition, and a definition it certainly was, consisting of a well known literary labor classic, attributed, at least, if not written by, Jack London. In any event --

Q One of the dictionary definitions, I'm interested to see, is that a "scab" is a low or contemptible person. Did you know that?

MR. RATNER: Yes, sir. I do believe that the CENTURY DICTIONARY ENCYCLOPEDIA, which I quoted earlier, dated 1897, describes the scab as "an opprobious term used by the workmen or others who dislike his action." Now, I assume that that means that to trade unionists those who refuse to join are low and contemptible people. The record here reflects that both the president of the local union, and the vice president of the national, stated their reasons for believing the so-called "free riders," who take the advantage of union representation without bearing their fair share of the cost, or any share of the cost, who are willing to profit from the benefits and the efforts of their fellows to maintain wages and working conditions, who do, as one of the plaintiffs here did -- Ziegengeist -- perform services off the clock, on free time, gratis, for his employer, are, in fact, low and contemptible people. They

choose to undermine the conditions for which workers have organized and have fought and struggled. That is their opinion of them, and it is our contention that both the National Labor Relations laws and the First Amendment guarantee their right among themselves to express that opinion, for the lawful purpose of exerting social pressure upon the nonmembers to join.

Now, we think that that proposition is supported by the decisions of this Court. The questions principally presented are, whether as a matter of federal preumption a state's jurisdiction over defamation arising out of labor disputes is limited to knowing or reckless misrepresentation of facts.

Q Of course, those are somewhat temperate definitions that you're giving. This publication, in effect, said, did it not, that these plaintiffs in that case -- the respondents here -- in effect, were gentlemen compared with Judas, who betrayed his master, by linking these alleged London definition of a scab with these men.

MR. RATNER: Your Honor, I take it that there is no line that can be drawn, constitutionally, between the vividness of the hyperbole, which can be protected, and that which is not. I do not believe that the Constitution or Linn, either one, distinguish the epithets which are particularly remarked in Linn as falling within the commonplace discussion.

And one of the labor board cases which specifically says that this London definition, itself, is protected under

Section 7, as falling without the area of protected speech in labor controversies, whereas this Court said, in Linn itself, "We do not judge by the normal standards of gentlemanly and polite speech." In labor controversies, the Court has pointed out, labor disputes are ordinarily heated affairs. The language that is commonplace there might well be deemed actionable per se in some state jurisdictions. Representation campaigns are frequently characterized by bitter and extreme charges, countercharges, unfounded rumors, vituperations, personal accusations, misrepresentations and distortions. Both labor and management often speak bluntly and recklessly, embellishing their respective positions with imprecatory language. This is word in --

Q Mr. Ratner --

MR. RATNER: Yes?

Q As I read Linn, and my reading is kind of reinforced by the quote you just read, it did arise in the context of a representational proceeding -- a dispute between management and labor. Was there such a dispute that this thing arose out of?

MR. RATNER: This arose out of the efforts of the union to bring into membership the remaining nonmembers who were employed in the postals career service. To answer your question shortly and bluntly, there was no legal proceeding pending before the National Labor Relations Board.

Q Well, was there any dispute between labor and

management?

MR. RATNER: No. As far as we know. There was a dispute between the members of the union and the nonmembers, which in Senn v. the Tile Layers Union, this Court has held to constitute a labor dispute; and which Section 29 of the National Labor Relations Act explicitly defines as a labor dispute. And which Angelos v. Cafeteria Workers explicitly holds is a labor dispute. Any effort by a union to induce nonmembers to join is, per se, a labor dispute, yes.

Now, in that context, to come back to --

Q Mr. Ratner, I take it that as far as the use of the word "scab" is concerned, it certainly is a true appellation here, is it not?

MR. RATNER: Yes, your Honor, it's absolutely true.

Q In any definition of the term. And it's your position, is it, that the rest of the material in this publication is just rhetorical hyperbole, so to speak?

MR. RATNER: It is precisely that. It is precisely that. And we say that it is rhetorical hyperbole not because we say so, but because under the teachings of Greenbelt v. Bresler it must be so held as a matter of constitutional fact, and that the lower court's attempt, without any rationale whatsoever -- the district court, I mean -- attempt without any rationale whatsoever to say that Bresler is completely different from this case is simply utterly untenable.

MR. CHIEF JUSTICE BURGER: We'll resume there after lunch, Mr. Ratner.

AFTERNOON SESSION

(1:00 p.m.)

MR. CHIEF JUSTICE BURGER: Mr. Mozart Ratner, you may resume.

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

I should like to refer to two other passages of Linn which have relevance, at least, here. One is that the labor board has concluded that epithets, such as "scab," "unfair," and "liar," are commonplace in these struggles -- I might add, as commonplace as the London definition -- and not so indefensible as to remove them from the protection of Section 7, even though the statements are erroneous and defame one of the parties of the dispute. It's on pages 60 to 61, and I continue, having skipped a sentence, on page 61, to the following: "In some the Board tolerates intemperate, abusive and inaccurate statements made by the union during attempts to organize employees, which is what this was. It does not interpret the Act as giving either party license to injure the other intentionally by circulating defamatory or insulting material known to be false."

Q It's sort of a two-handed statement, isn't it?

MR. RATNER: Your Honor, I -- to me, the only hand that counts is the last four words, "known to be false," versus the common law test, embodies the NEW YORK TIMES test, and lays down the boundary of state court jurisdiction. In order for a statement to be known to be false, it must be factual, because if it is not factual, as Judge Maris said in speaking for the Fifth Circuit in Curtis Publishing Co. v. Birdsong, which we cite in our brief, then it's simply not subject to the litmus paper test of truth or falsity at all. And if it's not subject to the litmus paper test of truth or falsity then it can't come within the scope of state court jurisdiction under Linn.

Q Apparently, I take it, what you're saying is that opinions would fall on the one side of that line and factual statements on the other.

MR. RATNER: I'm inclined to believe they would, unless opinions were matters of fact, which, conceivably, they might be.

Q The might be facts, they might be --

MR. RATNER: In other words, I might have an opinion of your Honor, and state the contrary one falsely and maliciously, and that, I think, might be actual. But hyperbole -- hyperbole certainly falls on the other side of the line. And that's the point I really want to make. That if rhetorical hyperbole, which is what the London statement is, is protected

constitution, and protected on the phrase that I read in Linn, then the protection must be coextensive with the artist's imagination, and certainly commensurate with the depth of the sentiment or the emotion -- in this case, particularly, revulsion against workers who refused to join their fellows in the union -- which the artist is seeking to express.

Actually, the images that are evoked by the London literature are not too difficult to compare with the image invoked -- and whose favor who can say -- by those people who called Bresler a blackmailer, which in Bresler, this Court held, enjoyed constitutional protection. And as the Chief Justice said, speaking for this Court in Organization For A Better Austin v. Keefe, "As long as the means of circulating such statements, and by such statements in that parenthetical expression, I mean extravagant, rhetorical hyperbole, are peaceful, the communication need not meet standards of acceptability. Standards of acceptability for good hyperbole and bad hyperbole there are none." And I suggest --

Q That was a prior restraint case, wasn't it?

MR. RATNER: Yes, your Honor, as it happens, Austin was a prior restraint case. But what is --

Q So that that comes right within the doctrine of the Near -- Near v. Minnesota.

MR. RATNER: I understand that the general framework of Austin was Near v. Minnesota and the prior restraint. But

what is said there about the First Amendment, and about the reasons for knocking down the rationale of the Illinois court which said that what it was doing was protecting the privacy of this businessman to conduct his business the way he chose to do, legally and as the laws of the state of Illinois gave him the right to conduct it, and who chose and elected not to sign the contract that this organization placed before him and demanded that he sign. And the Supreme Court held that that was an invasion of his privacy, and it further held that the leafleting was not protected because it was a means of coercing him to change his business practices, rather than as a means of communicating ideas. The striking down of those arguments was a matter of the philosophy of the First Amendment, not Near v. Minnesota and prior restraint.

Now, in one place we distinguish this case most seriously from the case that preceeded it. Workmen drawn together in a common occupation by a common employer work together whether they like it or not -- they're in a common community. And the choice to band themselves together as a union and to become members of the same organization and participate in its affairs and to contribute to its upkeep and to abide by its rules and by its laws is a voluntary choice that each of them must make in the society in which we live. I take the liberty from -- of quoting from this Court's decision in Time v. Hill, 385 U.S. at 38: "Exposure of the self to others in varying degrees --

is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press."

And so, every letter carrier exposes himself to the good or ill will of his fellows -- those who are union members and those who are not -- and when he makes the decision, and when he makes the choice, to join them in their union or not, he, by the same token, makes a choice of securing their social good will or thier social ill will.

Our opponents, indeed, concede that the union has a right to publish the fact of their "scabness" -- that they are "scabs," and, by publishing it, to seek to induce other letter carriers to exert social pressure upon them to join the union. They say, but they don't have the right to do it by extravagant hyperbole. We say they do, because the First Amendment protects extravagant hyperbole if it protects the right to speak about common interests at all. Co- -- hyperbole, however extravagant, is not obscenity.

What is relevant to this case is that the right to publish honestly held views or opinions, in classic or artistic or hyperbolic form, is protected where the publication particular goes to a special audience, which has a special interest in the subject matter, as this union monthly newsletter went only to the members of the union who were intimately concerned with the union status of each of the nonmembers, because it af-

fected their pocketbooks immediately, for one thing.

Q May I inquire what the circulation of the monthly newsletter was?

MR. RATNER: 525, 420 of whom are active members of the Letter Carriers, the balance being retired letter carriers.

Q And it's your position that this is a news media entitled to the same principles that protect the NEW YORK TIMES?

MR. RATNER: Absolutely.

Q Right.

MR. RATNER: Precisely as if this were a chemical society, whose members were all chemists, and whose publication was devoted exclusively to the interests of chemists, it would have no less protection than the NEW YORK TIMES.

Q Is there any limit on this? I live in an apartment here in Washington that publishes monthly a little mimeographed sheet -- sometimes it's a page, sometimes it's a couple of pages -- news about our apartment. Would that be the equivalent of the news media, for constitutional purposes?

MR. RATNER: I see no reason why the NEW YORK TIMES rule should not apply to the publisher of that publication.

Q Would you --

MR. RATNER: None whatsoever, assuming the postulate you put in your question --

Q Thank you --

MR. RATNER: -- that the matter is limited to matters

of common and proper interest to the residents of the apartment. I'm not saying that everything that the -- each resident of the apartment may do in his own privacy of his home is a matter of legitimate interest to his neighbors. But if what he does affects, by the doing of it, the lives of those around him -- if he doesn't take his garbage and drop it in the appropriate garbage disposal place, but leaves it outside for somebody else to do or stink up the hall -- I am sure that this is a matter about which the publication might legitimately take note.

Q Assume there was no publication whatever, and the manager of the apartment falsely accused a tenant of misconduct. Would that be subject to the same protection as the principle enunciated the NEW YORK TIMES gives people in the press?

MR. RATNER: I see nothing in the rationale of the NEW YORK TIMES or of the First Amendment that warrants its extension to that case.

Q In other words, you draw the line between media, as broadly defined by you, on the one hand, and what an individual may say in his individual capacity?

MR. RATNER: I think that freedom of speech and freedom of the press have a quite different meaning when they are involved in matters of concern to more than the two disputants or the two individuals who may be considering something, yes.

Q Well, suppose the -- suppose the slander were uttered in a stump speech on the corner of a public street.

Would the speaker have the same protection as the news media?

MR. RATNER: It depends on what he's talking about and what the interest of his audience is. If there is both a common interest in the subject matter, and the relevancy to that subject matter and an interest of the speaker in that subject matter, and that the subject of which the spe- -- to which the speech is addressed, has somehow been involved, willingly or unwillingly, but necessarily involved under the Hill theory and the controversy the speaker on the stump knows of -- is entitled to no less protection than the publish --

Let's not speak of the publisher of the NEW YORK TIMES, if your Honor please. I think that that's the wrong analogy. Let's talk about the man who rises at City Hall meetings and calls Bresler a blackmailer. He is the person whose constitutional rights, on the First Amendment issue, are the equivalent of your public speaker on the stump. We have a different case here 'cause we have a labor dispute and we have Linn, and we have federal preemption, and so on, so this is an easier case.

But the case that you put must be measured, it seems to me, in terms of the outraged citizen of Greenbelt who thinks that black -- that Bresler's tactics are blackmail.

Now, I want to turn the few moments that are left to what the Supreme Court of Virginia did with this case. The first thing it did with this case was to throw Linn out of the

window on the ground that it had a new theory. You couldn't have a violation of Virginia's statute for insulting words unless you also came up with common law malice. Well, the answer is that common law malice has nothing whatsoever to do with Linn; that was reversed in favor of the NEW YORK TIMES rule which was adopted by analogy.

Secondly, the court got rid --

I'd rather reserve the balance of my time.

Thank you.

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

Mr. Kapral?

ORAL ARGUMENT OF STEPHEN M. KAPRAL, ESQ.,

ON BEHALF OF THE APPELLEES

MR. KAPRAL: Chief Justice Burger and members of the honorable Court:

I would like to distinguish a few matters concerning the factual situation.

It must be kept in mind that all three of the appellees involved here have been employed in the Richmond postal service for 14, 13 and 12 years, respectivley. During this time, they elected not to become affiliated with the union, a right that they certainly had under EXECUTIVE Order 11491 and the Virginia "Right to Work Law."

Well, on two occasions preceeding the libelous publication in question, the name of Mr. Austin was printed in the

local branch newsletter under the heading of, "A List of Scabs." At the time, the actual so-called Jack London definition was not in there -- just the names under a list of scabs. Mr. Austin didn't like this at all, and he, first of all, went to the Richmond Post Of- -- the Postmaster of the Richmond Post Office, stating that he thought that management should be advised that coercive tactics were being used on persons trying to get them to join the union.

Nothing was done, so he then went to the local union president of the local union. At that time, he received the response that there is nothing the local union could do about it -- absolutely nothing. This was a tool used by the union to attempt to get persons to join the union, and the only thing that he could do would be to join the union.

Now, at this time, I would make it perfectly clear that the calling of the appellees "scabs" is not the subject of the suit involved here, but rather, what we are concerned with is the fact that these three gentlemen were held up to ridicule with their fellow employees by attributing to each one of them lack of character, rotten principles, and being traitors to God, country, family and class.

Now, the union would contend that, certainly, this was mere hyperbole -- that no one would take the same seriously. But the fact remains that at the trial, Secretary Angelo Parker of the union, testified that he felt the appellees' prin-

ciples should be questioned. In fact, he felt they had rotten principles. The president of the local union testified that this was done for one reason and one reason alone -- so that fellow employees would stop associating with these three persons.

I think an interesting point in clarifying the situation that we are dealing with here today as being one of first instance, was brought forth by Mr. Kenneth Fiester, president of the International Labor Press Association, where, on the witness stand, he testified that he has been involved in the labor movement for some 30 years, and that during this 30 years he has seen this article printed numerous times; in fact, so many numerous times that he could even begin to try to count how many times.

Yet, under cross-examination, he admitted that in the entire 30-some year period he had never actually seen this article appear, listing certain persons names, named as individuals as here.

All three of the appellees stated that they had all experienced for a very, very long time a good relationship with fellow workers, and up until the time that this article appeared

What we have here, I feel the main problem involved here is whether what was done -- what was printed -- this publication -- of and concerning the appellees, whether this falls within the doctrine of NEW YORK TIMES v. Sullivan. Of course,

we propose at this time that it does not. It does not. This Court, in Curtis Publishing Co. v. Butts, extended the knowing falsity or reckless disregard of truth or falsity rule to include public figures.

In 1970, this honorable Court, in the Rosenbloom case, extended this rule to include a private individual where the statements involved an issue of involvement and they were a matter of general or public concern.

Now, at this time, I must say, it is hard to imagine where any public concern or public issue could be involved here. Well pa- --

Q Is there a statutory question in this case at all, under the Labor Relations law?

MR. KAPRAL: A preemption question, your Honor?

Q Yes.

MR. KAPRAL: Well, there is a valid question. There has been a question --

Q Well, don't you should deal with that first, before getting to some constitutional question?

MR. KAPRAL: Well, yes, your Honor, I am prepared to deal with it.

Q Isn't that Linn? Isn't that Linn and --

MR. KAPRAL: That's Linn v. Plant Guard Workers -- that's correct.

Q How do you -- I don't suppose we reached the

constitutional question, or Metromedia, or all those cases, if Linn controls this case.

MR. KAPRAL: Well, your Honor, in the Linn case, of course, dealt with the extent to which --

Q Linn wasn't the NEW YORK TIMES case --

MR. KAPRAL: Correct. But Linn dealt to what extent the NEW YORK T- -- to what extent the states are preempted by the National Labor Relations Act, and to -- in the libel -- suit for libel involving a labor dispute. Of course, I, at this time, say that there's --

Q And there was in -- if the Linn testifies this judgement should not have been entered, should it?

MR. KAPRAL: I would respectively disagree with your Honor --

Q Oh, really? You think this was consistent with Linn?

MR. KAPRAL: In some respects it was. I feel that in Linn --

Q Well, in some respects it was inconsistent?

MR. KAPRAL: The Court, your Honor, the Court stated in Linn that in matters of merely peripheral concern, such as the facts of the case indicate here, that in a situation like that, the states had jurisdiction.

Q The states had jurisdiction to -- provided that the libel was proved to have been committed with malice, as de-

fined in the case.

MR. KAPRAL: Well, there is -- of course, there we get into the situation on -- of course, the Court said in the Linn case that the NEW YORK TIMES rule was adapted by --

Q That's what I'm saying.

MR. KAPRAL: -- analogy.

Q That's right.

MR. KAPRAL: And it gets down to the situation, what does the term "analogy" actually mean? Does it mean "comparable principles" or does it mean "by constitutional compulsion"?

Q Well, anyway, what is your position with respect to the applicability of Linn, whatever Linn means?

MR. KAPRAL: My position, your Honor, is that in the Linn case, the court -- the Supreme Court of Virginia stated that the Linn case, that the states were not -- of course, this Court stated -- excuse me -- that the states are not preempted by the National Labor Relations Act --

Q Well, I know, but why is that? Is this a labor dispute, or not?

MR. KAPRAL: I wouldn't go -- to say it's not a labor dispute. I'd say the fact that three individuals chose a private right not to join the union -- a right that they had, is certainly not, and I don't see where it's a labor dispute. There's no question of wages and hours involved, no question of working conditions, no picketing --

Q Well, if, I suppose, it's arguably an unfair labor practice to coerce employees to join a labor union, isn't it?

MR. KAPRAL: Well, your Honor, there again, the appellants --

Q Well, isn't that as plain 8(d)3?

MR. KAPRAL: If you would term hyperbolic, as they would say, this is mere hyperbolic venting of emotions, so, therefore, it didn't come under that.

Q Well, now, but you say it's more than that.

MR. KAPRAL: I say, your Honor, it's questionable whether --

Q Well, you can't have it both ways, and neither can they.

MR. KAPRAL: I realize that.

Q Well, what is your position, then, as to why Linn doesn't apply? It must be that you -- if you're wrong that it's not a labor dispute, is that what the applicability of Linn turns on? Whether this is a labor dispute?

MR. KAPRAL: I think it's a question of whether it's a labor dispute or not, yes. I would say at this time that it is not a labor dispute. The facts don't bear out that it is a labor dispute. Three unknown individuals -- relatively unknown -- individuals choose privately not to become affiliated with the union. A right that they had --

Q And what law does it -- the determination whether

it's a labor dispute turn -- on federal or state law?

MR. KAPRAL: Well, on the National Labor Relations Act, your Honor.

Q Federal law.

MR. KAPRAL: Federal law.

Q Well, is the explanation you've just given us about Linn the one that the Virginia court adopted? Or did they say Linn wasn't applicable because there's malice here?

MR. KAPRAL: I believe, your Honor, that was the -- their holding -- there was actual malice here.

Q And you're not trying to explain Linn away on that basis?

MR. KAPRAL: I wasn't, your Honor. No.

Q So the reason that the Virginia court gave you don't defend?

MR. KAPRAL: Pardon?

Q You don't defend the reason the Virginia court gave?

MR. KAPRAL: Well, I do. Yes, I do. I certainly have drawn the Virginia view -- Now --

Q Well, let's see. That would be a position, then, if you are wrong on the issue of labor dispute, and Linn does apply, then your alternative ground is taken by the Virginia court, namely that Linn was satisfied.

MR. KAPRAL: Yes, and malice was shown.

Q Do you contend at all, Mr. Kapral, that under the fact situation which Linn arose, being a labor management dispute, anything that the Linn case said as to the -- any broader sweep of the preemption would be dicta, and be open to reexamination?

MR. KAPRAL: Well, your Honor, of course, the Linn case was more of a classic example of a labor dispute -- there was labor and management being involved. And not only that, Mr. Linn, of course, was the head of a large national detective agency. I think he fell into the question of a public figure certainly more than the three appellees do in our case.

Your Honor, of course, the union had a privilege -- a qualified privilege -- the right to let fellow members be advised that these three persons were not members of the union. Nobody doubts that fact. But it could have been done in a much more diplomatic way -- a way to inform and not to injure.

Q You don't have to go so far as to say that they must do it in a diplomatic way, do you?

MR. KAPRAL: Well, maybe not diplomatic, but --

Q All you have to do is say it in a nonlibelous --

MR. KAPRAL: In a nonlibelous way. What they would say, Chief Justice Burger, is that what you cannot do directly you can do indirectly. In other words, by couching expressions and terms in hyperbolic fashion you can escape the conscription of libel. This is what they're saying. And I say, of course,

this is not right.

In using this article, of course, and the word, and for the purpose that the union used it, it abuses the qualified privilege that was given to them -- the privilege to let the union members know that -- who were not union members, and therefore, they are -- the union is liable to the appellees for doing so.

Aside from being an effort, of course, of the union to compel appellees to join the union, no labor dispute was involved. Everybody in the Richmond Post Office except a handful of carriers, at the Richmond Post Office, were already members of the union. There is no violence here anyplace shown, no picketing, no publicity -- in what way, possibly, could the public have any interest in whether or not these three individuals use their right to join the union or not? Exercise that right?

I feel that this case can be -- again, can be distinguished from the Rosenbloom case inasmuch as in that case, of course, it was a circulation intended to reach the general public. Here we're just attempting to reach a specific group, namely, the union members. And in that case, of course, we had criminal conduct involved, we had obscenity involved. Certainly these are factors that the general public would be interested in. No doubt about it. But, I say in this case, absolutely no way that I -- possibly a person could say, with-

out stretching Rosenbloom way out of proportion, that these persons came under the realm of Rosenbloom.

Of course, now, the appellants listed the Jack London article that was introduced into evidence -- nowhere does this Jack London article name appellees. Under the article it's printed, but nowhere underneath it is anyone's name listed. And, as I said earlier, this was brought out at the trial, that never, in a 30-some year following of the labor movement in this country, had this person ever seen this before.

The main reason we propose at this time that this article was written, for one reason alone, to exert pressure on these individuals to join the union and to exert so fellow workers would ostracize them, and no longer associate with these persons.

We get into the question of whether freedom of speech and the press permits a publication of this type of libelous article. In the case of Chaplinsky v. New Hampshire, this Court stated, and I quote, "that it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain, well-defined and narrowly limited classes of speech the prevention and punishment of which have never been thought to raise any constitutional problem."

Now, of course, no violence was present in this case, very true, but Mr. Austin, one of the appellants stated that on one occasion he was confronted by the union steward, and that

he was able to restrain himself from committing an assault upon this person, and that the article, on many occasions, provoked him to the point where he considered committing assault on persons.

Gentlemen, I thank you, and at this time my colleague, Mr. Cherry, will continue the argument.

MR. CHIEF JUSTICE BURGER: Mr. Cherry?

ORAL ARGUMENT OF PARKER E. CHERRY, ESQ.,

ON BEHALF OF THE APPELLEES

MR. CHERRY: Mr. Chief Justice, and if the Court please:

This Court, in the Linn case, afforded workers a measure of protection against malicious libel causing them harm. When the workers were given that measure of protection, the NEW YORK TIMES rule had already been promulgated and was held not constitutionally applicable. Today, we are viewing the measure of protection afforded nonunion workers in the light of the progeny of NEW YORK TIMES, that is, Curtis Publishing Co., and Rosenbloom v. Metromedia.

The majority opinion in Rosenbloom left open to future determination the extent of a private person's involvement in matters of public interest. Mr. Justice Marshall, in his dissent in Rosenbloom, with which Mr. Justice Stewart and Mr. Justice Harlan concurred, pointed out that two essential and fundamental values conflict. That is, the right of

an obscure and anonymous person for protection from unjustified insult and wrongful hurt, which he states reflects no more than our basic concept of the essential dignity and worth of every human being.

On the other hand, the concept of a citizen informed by a free and unfettered press.

With this conflict of fundamental rights, it is necessary for the Court to determine which of the fundamental rights is the more compelling and paramount. This conflict must be viewed and resolved in the light of the particular circumstances under which the conflict arose. In considering the rights of a private and anonymous citizen giving way by reason of his being involved in a matter of general public interest, the right of the public to be informed by free and unfettered press, I make the point that there is a basic difference between a labor union and the public media. And particularly so in the relationship between a labor union and a nonunion worker in a plant or organization in which union is bargaining agent. Union, first, is not concerned with informing the public -- the general public, but is concerned with promoting its own particular interests, which interests are in direct conflict with the interests of a nonunion worker.

The union newsletter, which has just been mentioned, was circulated only to union members, and not to the general public. On the other hand, the media's only interest is in-

forming the public on a matter which is of general or public interest. It is without bias in the matter. And this is not true in the case of union.

When we consider, with this background, the right of the individual nonunion worker under the circumstances here of merely failing, or refusing to join union as against the right of the general public to know, even if this could be considered a matter of general, public interest, the compelling and paramount interest, we assert, is clearly that of the nonunion worker. If union had this right, it would have within its power, by publishing in its little newsletter, to make anything a matter of public interest. The man that has the bias -- the organization that has the bias -- would have the right of making it a matter of public interest.

Now, this matter, that we're talking about here, had never been in the press, it had never been discussed anywhere -- it was strictly between union and these particular nonunion workers. Under the protection of the NEW YORK TIMES rule, a standard most difficult and almost impossible of proof by the aggrieved person, union would be able to harass and coerce nonunion workers. The rights of nonunion workers not to join union, under various state right to work laws, and in the instant case, under the EXECUTIVE Order as well, would be largely nullified. Now, the EXECUTIVE Order does say specifically that the union cannot -- has no right to coerce nonunion mem-

bers into joining.

So that when Mr. Austin went to the Postmaster General, and went to the president of that union, to complain, he was well within his rights to say, "They are attempting to coerce me." And they, themselves, as I took it from what Mr. Ratner said here today, for practical purpose, admits they were attempting to coerce them. At least the tactics, as I construe them, would mean that.

In the case before us, the president of the union admitted that this publication was one of the tools used by union to compel nonunion members to join. Unions are, today, wealthy, monolithic organizations with almost unlimited resources as opposed to a few nonunion workers in a particular plant. Armed with virtual immunity under NEW YORK TIMES rule, union would have within its power the means, if it so chose, and as it did here.

Q Didn't this violate the Labor Act?

MR. CHERRY: Yes, sir, it violates that -- it violates the --

Q It does violate the --

MR. CHERRY: It does violate that. But the right to the union in here is under the EXECUTIVE Order. Now, that's what the Supreme Court of Virginia says -- that it was under that that they're permitted to --

Q But you admit that it was a violation of the

National Labor Relations Act?

MR. CHERRY: Yes, sir. I don't think -- I think, yes, I think I would have to say that they have no right to -- the National Labor Relations Act says they have no right to coerce. But, again, that is on the peripheric concern of the National Labor Relations Act.

Q Well, would the National Labor Relations Board have had a jurisdiction over a labor-management dispute between the mail carriers and the head of the postal corporation?

MR. CHERRY: I do not believe so, no, sir.

Q Well, haven't -- have they exercised any jurisdiction over the --

MR. CHERRY: No exercise -- no jurisdiction was ever exercised.

Q I took your answer to mean that --

MR. CHERRY: None that I --

Q -- if this was the case, within the National Labor Relations Act, the conduct constituted coercion that is forbidden by that Act --

MR. CHERRY: That's right --

Q -- in relation to the constituents covered by it.

MR. CHERRY: That's right. But not within it in the form that we're dealing with matters between the employer and the union and whatnot.

Q Well, the Virginia Supreme Court said the effect of EXECUTIVE Order 11491, which is essentially equivalent in both content and purpose to the National Labor Relations Act.

MR. CHERRY: Yes, sir.

Q Now, if it's essentially equivalent, there must be some authority that adjudicates what's called unfair practices.

MR. CHERRY: Well, the EXECUTIVE Order does say that they shall not coerce workers.

Q All right. Now who adjudicates that?

MR. CHERRY: I believe the -- because there is in there provision that the Postmaster General in the area has the obligation of seeing that that is enforced.

Q But Linn is a preemption case, and it's a non-preemption case --

MR. CHERRY: Yes, sir.

Q -- then if this EXECUTIVE Order referred to has no preemptive effect whatsoever, why, Linn is beside the point; then you do reach the constitutional issue right away.

MR. CHERRY: Yes, sir, I think so.

Q Well, what do you say?

MR. CHERRY: I say that -- you mean as to the NEW YORK TIMES rule?

Q As to preemption or not of --

MR. CHERRY: I think that it had not preempted the

state jurisdiction in this case -- the state had jurisdiction.

Q Well, I understood your other --

Q -- the answer to my question --

Q Well, what is the answer?

MR. CHERRY: I did not so --

Q We see --

MR. CHERRY: In the case -- Now, we do not believe that the publication concerning appellees was a matter of public or general interest, for whether appellees join union or not could hardly be said to be of any interest or concern to the public generally.

The majority opinion in Rosenbloom expressly --

Q Mr. Cherry, would you say the same thing about the American Medical Association Journal, as not being of any public interest to the public generally? Or the ABA Journal?

MR. CHERRY: I think they are probably couched in such terms that they are of interest to a limited audience, there, and I think, perhaps, if you got into the medical journal itself which would deal with highly complex medical terms, would not be of general interest to the public, but would be of interest to medical -- members of that profession.

Now, as I stated, the majority opinion in Rosenbloom expressly leaves open to future determination the constitutional standard to be applied, if any, in the enforcement of state libel laws published by news media about a person's activities

not within the public or general concern. Since it is indicated that some areas of a person's activity are outside the area of general or public concern, we urge that a nonunion member's decision not to join union is outside that area. Nor should the union be afforded the same protection as is accorded news media, for it is, in effect, arming the union with a club to deal with any recalcitrant worker who desires to exercise his right not to join.

The overriding and paramount interest here is protection for the individual worker.

It has been said by union that Linn itself defied application of NEW YORK TIMES rule. However, there is no constitutional compulsion to use the NEW YORK TIMES standard. Linn decided one issue, and one issue only, and it is --

Q Excuse me, Mr. Cherry. I notice in Appendix D of the jurisdictional statement is EXECUTIVE Order 11491 on page 17a that provides for a federal labor relations counsel, and then provides that the Assistant Secretary of Labor for Labor Management Relations shall, except as provided in Section 19(d) of this Order, decide complaints of alleged unfair labor practices, and alleged violations of the standards of conduct for labor organizations; and 19(d) apparently has reference to -- that exception covers grievance procedures and so forth, in lieu of.

So, apparently, the EXECUTIVE Order does set up a mechanism for the determination of complaints of alleged unfair

practices, comparable to --

MR. CHERRY: The National Labor Relations --

Q -- the National Labor Relations Board does, doesn't it?

MR. CHERRY: Perhaps, perhaps so, yes.

Q Have you ever heard this being used?

MR. CHERRY: No, sir, I haven't. I have not.

Q Well, if you say that -- what you are saying is that the union tried to coerce these people to be members --

MR. CHERRY: That's right.

Q 8(b)3 -- no, 8(b)1 -- "to interfere with, restrain or coerce an employee in the exercise of his rights assurred by this Order." Now, one of his rights is to be or not to be a member of a labor organization.

MR. CHERRY: That's correct, yes, sir.

Q Well, wouldn't you think this -- at least arguably, then, that what the union was doing here -- you say it was coercing them to be a member -- at least arguably it was an unfair labor practice, under this EXECUTIVE Order.

MR. CHERRY: Yes, but in the periphery of concern; they are not in the direct concern.

Q Well, I am -- that may be so, but Linn takes hold, I would suppose, when, arguably, something is an unfair practice within the exclusive jurisdiction of the NLRB or some comparable agency.

MR. CHERRY: Yes, Linn does, sir; we do deal in Linn with preemption. I have to say that Linn deals with the first thing that you tell them.

Q Now, you say it would not seem to be --

MR. CHERRY: It was not preempted. Yes, sir, I already said that.

Now, one final point here, that in Linn and in reading Linn, because there is a lot of language in Linn there, some as quoted by my opponent here, in that opinion, and, actually, and I'll look to the dissenting opinion to see what they said it meant -- and they said that what the majority meant was a malevolent desire to injure, which is not the NEW YORK TIMES Rule. They defined it as, here, sir, they've defined it as a malevolent desire to injure; and that's not the NEW YORK TIMES standard there. So I take it -- and they did use, in the majority opinion, they did use that language also -- so I take it that that was --

I thank you.

MR. CHIEF JUSTICE BURGER: Mr. Ratner, you have about four minutes left.

ORAL REBUTTAL OF MOZART G. RATNER, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. RATNER: May it please --

Q Mr. Ratner, is this procedure used very often?

MR. RATNER: You're right, it's used very often, daily

Q And what -- was an Assistant Secretary of Labor --

MR. RATNER: The Deputy is the one who actually issues the decision --

Q Deputy what?

MR. RATNER: Assistant Secretary of Labor. He's especially delegated --

Q And are the formalities comparable to what goes on before --

MR. RATNER: Precisely. They issue trial examiner's reports every day; they come across my desk, on exactly this kind of problem. Incidentally, it is -- where it argued in that fashion we would vigorously defend and unquestionably win, on the ground that this was no coercion within the meaning of the statute --

Q Well, apart from that -- on the preemption question --

MR. RATNER: On the preemption question, there is absolutely no doubt whatsoever, that the --

Q Does the National Labor Relations Act govern labor-management relations between this union and this management?

MR. RATNER: It does now, but it didn't at the time this case arose. At the time this case arose, labor-management relations between this management and this union were governed under the EXECUTIVE Order referred to, which had the enforce-

ment provisions referred to by Mr. Jusitce Brennan, and in those days, virtually every day of the week complaints were made about labor organizations to the Assistant Secretary of Labor about coercion of employees to join unions.

Q They were -- were they based on, say, 8(b)1?

MR. RATNER: Yes, they were based on exactly the provisions of the EXECUTIVE Order which incorporate almost in haec verba the terms of the National -- the prohibitions of the National Labor Relations Act.

Q But it's by virtue of the EXECUTIVE Order that --

MR. RATNER: By virtue of the EXECUTIVE Order, if that is your question, yes. And the court below held that the EXECUTIVE Order -- following decisions not of this Court, but of three unanimous Circuits -- held that the EXECUTIVE Order had the force of law, and therefore, for preemption purposes, was the equivalent of the National Labor Relations Act in this field.

Q Mr. Ratner, what governs these relations under the National Labor Relations Act?

MR. RATNER: The Postal Reorganization Act --

Q Oh, the -- I see.

MR. RATNER: -- which has changed the picture and brought postal labor relations --

Q By explicit provisions -- ?

MR. RATNER: By explicit provisions under the terms of the National Labor Relations Act. However, the situation that

the courts below conceded was identical, for preemption purposes, before, unless we want to forget what preemption is all about, which is avoidance of unseemly conflict between federal and state authority.

I want to say that my colleague, Mr. Kapral, keeps confusing in his brief taking a statement literally with taking a statement seriously. Of course, the hyperbole was intended to be taken seriously. Our point is that it was not, and could not have been, because it was not written to be, and was not published to be taken literally. It was an expression of emotion and a concept of feeling.

Q Tell me, Mr. Ratner, if the opinion of the Virginia Supreme Court is to be read as saying, yes, there's preemption, but the Linn standard was satisfied. What's your answer? About --

MR. RATNER: That the Linn standard was satisfied? Well, of course they're completely wrong, because the Linn standard was not satisfied. The Linn standard is NEW YORK TIMES and not common law malice. They're completely wrong about that, and they're completely wrong about another thing.

Q Well, now, wait a minute. Don't rush so fast. What they -- apparently what you're suggesting they held was, erroneously, that common law malice satisfied the Linn standard--

MR. RATNER: Yes, your Honor --

Q -- when, in fact, what this Court held was that

only NEW YORK TIMES malice was satisfied. Is that it?

MR. RATNER: That ends it.

Q All right.

MR. RATNER: They are wrong exactly the same way and for exactly the same reason in another respect -- when they sustained the Virginia statute for insulting words, because they said, we now come within the scope of what's constitutionally immune -- that is, constitutionally not protected -- when we say that if these words are spoken with common law malice there is no overage problem and no vagueness problem -- that all disappears. They're just flat wrong.

Q Now, Mr. Ratner, let me interrupt you, too. I think this bears on what you've just said, and maybe you've answered it, but I didn't quite sense that you did. If Linn applies, is there a greater, more stringent test under Linn than under the First Amendment?

MR. RATNER: The only conceivable difference is that you don't have to unless you wish to reach my special audience, argue my public issue argue -- If this is a labor dispute, and Linn applies, you don't have to go where I go in the brief, when I urge you to say that what in fact has happened here, or ought to be happened, is the transmutation of the better common law rule, which always created a qualified privilege for communication to those interested in a particular subject matter. Creation of that common -- elevation of that common law privi-

lege to constitutional status, and then the superimposition upon that elevation of the NEW YORK TIMES test of falsity, intentional or willful, for the old common law falsity test -- not fa- test -- not of falsity, but of ill will.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

[Whereupon, at 1:49 o'clock p.m., the case was submitted.]

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