In the

Supreme Court of the United States

SUPER TIRE ENGIEERING COMPANY, et al.,

Petitioners,

vs

LLOYD W. McCORKLE, et al.,

Respondents.

No. 72-1554

Washington, D. C.
January 15, 1974

Pages 1 thru 58

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v.	:	No. 72-1554
LLOYD W. McCORKLE, et al., Respondents.	:	

Washington, D. C.,

Tuesday, January 15, 1974.

The above-entitled matter came on for argument at 11:25 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:

LAWRENCE M. COHEN, ESQ., Lederer, Fox and Grove, 111 West Washington Street, Chicago, Illinois 60602; for the Petitioners.

ROBERT F. O'BRIEN, ESQ., Tomar, Parks, Seliger, Simonoff & Adourian, 400 Market Street, Camden, New Jersey 08102; for Respondent Teamsters Local Union No. 676.

APPEARANCES [Cont'd]:

STEPHEN SKILLMAN, ESQ., First Assistant Attorney General of New Jersey, State House Annex, Trenton, New Jersey 08625; for Respondents McCorkle and Engelman.

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 72-1554, Super Tire Engineering against McCorkle.

Mr. Cohen.

ORAL ARGUMENT OF LAWRENCE M. COHEN, ESQ.,

ON BEHALF OF THE PETITIONERS

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

This case presents two issues for decision.

First, are substantial State welfare subsidies to strikers, which are payable solely because of the strike, an impermissible intrusion upon the National Labor policy of free collective bargaining?

And second, whether a declaratory judgment action to resolve that important issue, because -- is rendered moot when the particular strike during which the payments are made is settled? Notwithstanding that such payments continue and continue to have an effect on both the same employer and on other employers in the State.

This case arose on May 14th, 1971, when employees of Super Tire Company, who were represented by Respondent Teamsters Local 676, struck to obtain an agreement as to their proposals for a new collective bargaining agreement.

During the first thirty days of that strike, many of the strikers received public welfare assistance under a

totally funded, State-funded program, New Jersey General Public Assistance Program.

Subsequently, after a thirty-day waiting period had elapsed, the strikers became eligible for and received assistance under a joint federal-State program, Aid to Families of Dependent Children.

That program is no longer in effect in New Jersey, and has now been replaced by another totally State-funded program, Aid to Families of the Working Poor.

This action was filed on June 10th, 1971, after the strike had continued for approximately three weeks. It sought both declaratory and injunctive relief.

The crux of the case was the issue of whether the supremacy clause embodying the Federal Labor Policy precluded the State and federal welfare subsidies to strikers.

The argument was that such payments, and the availability of such payments, violated the National Labor Policy of free collective bargaining.

This issue came before the court on June 24th, 1971. The company argued two things: First, it argued that as a matter of law it was correct, that there was a substantial State inference by the statute itself, by the regulations itself, and therefore that was an impermissible intrusion on the free collective bargaining.

It further offered to demonstrate, through the

testimony of State officials who were present, through the testimony of expert witnesses who were present, that there was substantial interference in this particular case, where the collective bargaining relation sits between Super Tire and Teamsters Local 676.

The District Court, however, orally dismissed the case under Rule 12(b)(6) for failure to state a claim.

Four days later, on June 28th, the strike ended. The employees returned to work.

The company thereupon appealed to the Court of Appeals for the Third Circuit, which, in a lengthy, divided opinion, dismissed the appeal as moot.

The basis for the Third Circuit's opinion was the belief that this Court's decision in Oil Workers v. Missouri required a separate, distinct rule for labor cases as opposed to other controversies; and that in a labor controversy, as least where the government is a defendant, a finding that settlement of a strike would moot the determination of any issues that could arise as a result of that strike.

QUESTION: Suppose we agree with you, what do we do with it?

MR. COHEN: I think you should decided it, Mr. Justice Brennan. I think you should --

QUESTION: Well, they didn't decide it below, why should we? First.

MR. COHEN: Well, there are several reasons. We're dealing with an issue here, welfare to strikers, which has been presented on numerous occasions to this Court. It's probably the most controversial, one of the most controversial labor cases we have today.

QUESTION: Look out, don't overstate it.

MR. COHEN: Well, I don't think I am overstating it. I'm looking at the --

QUESTION: Well, that may be --

MR. COHEN: It's the first thing --

QUESTION: -- the best argument for remanding it.

QUESTION: Yes.

MR. COHEN: It also is a case that, I submit, you do not have to have a record, apart from what's already present, to decide. I think the case can be decided as a matter of law. There's no need to take testimony here. There's no need for an exhaustive analysis required.

Nobody -- there's no need to do anything but look at the State statutes and the State regulations, which have been presented and are part of the Appendix, look at the briefs of the parties in which this issue has been fully briefed to this Court, and then, I think, based upon those two considerations, a decision is possible.

I think that's --

QUESTION: Have you cited any case to us in which

this Court has taken that route, that you're now suggesting?

MR. COHEN: This Court has decided cases where, in the interest of economy, they felt the record was complete enough to decide it, even though the lower court had found no jurisdiction. We do not cite any case of that, but I'll be glad to supply the Court with those in a supplemental brief, if necessary.

I have one specific --

QUESTION: Can you tell me, Mr. Cohen, are the New Jersey statutes, or statute, whatever it is, is that a counterpart precisely of similar statutes in other States?

MR. COHEN: The New Jersey State statute, the General Assistance Program, has a counterpart in every State in the United States. The New Jersey --

QUESTION: I mean -- I'm speaking now of welfare payments to --

MR. COHEN: Yes.

QUESTION: -- strikers.

MR. COHEN: Well, there's three statutes involved in the case. We have the New Jersey -- the totally State-funded New Jersey plan, which operated during the first thirty days, the General Public Assistance Plan. That type of statute has its counterpart in every State in the United States.

QUESTION: And under -- in every other State do the

strikers --

MR. COHEN: Under every State --

QUESTION: -- get payments under it?

MR. COHEN: -- under their program, that's a State program, most -- the States are divided; some pay strikers, some do not pay strikers. Iowa doesn't pay strikers; New Jersey does. Maryland doesn't pay strikers; Massachusetts does. And so on down the line.

We also have a federal, the Aid to Families of Dependent Children program, that was in effect then but is not now in effect in New Jersey. It's an optional State program, the youth program under that, the latest statistics I've seen are that 29 States have a youth program at this time.

Of those 29 States there are approximately seven who have qualifications to strikers. Maryland says we don't pay anybody who has, who is ineligible for unemployment compensation.

Kansas and Nebraska say we don't pay anybody who's engaged in unlawful strikes, as I believe some States say we pay people but we don't pay anybody who's engaged in a lockout.

And there's limitations of --

QUESTION: Are you trying to suggest that, despite these differences --

MR. COHEN: Well, I think the principle is what's

involved --

QUESTION: -- that if we decide this, it's going to be of national --

MR. COHEN: I think what the principle is that needs to be decided is whether States can pay welfare under the -- whether it's to people engaged in any form of economic pressure which is permissible under federal law. That's really the question of whether that type of issue, which pervades -- I agree, it pervades State programs, it applies to Unemployment Compensation. The States have generally many forms of assistance.

But their general principle, it seems to me, is an important principle that needs to be resolved. And we think that this Court -- you should decide it, or, at the very least, provide guidelines for the District Court here, if it does remand, so that the District Court will know how to apply a standard here.

This is an issue that, as I say, is being litigated throughout the country, and at this time there is no real guideline as to how the lower court should operate.

So, even if the Court disagrees with me and finds that there is an incomplete record here and it needs a better record to decide it, I would hope that it would provide some assistance to counsel, such as myself, who have to litigate this case throughout the country, and would like to be able to

be informed whether the huge test that the First Circuit applied in Grinnell, for example, is an appropriate method of proceeding in this area.

I'd like to first address my comments to the mootness argument, because that certainly was the basis for the decision below, and the only basis for the decision below.

I think the first consideration in the mootness area is whether the Court of Appeals was correct in saying that there should be a different mootness test for labor controversies or for controversies where the government is the defendant rather than the plaintiff, or whether we should have a series of variables that will regulate mootness in cases that come up for appellate review.

Or whether, conversely, as we contend, there's an avowedly mootness concept, most recently articulated in cases such as Sibron and Moore, which apply to all cases and governs the disposition of all cases regardless of what field of law is involved.

The court below, at the outset of its opinion, seemed to indicate that that was the rule. They articulated four criteria of mootness, which we think are appropriate. They said the test whether there's an effect -- possibility of an effective decree; second, whether the controversy is concrete; third, whether the parties are in a sufficiently adverse context to assure effective litigation; and, finally,

apart from all the other tests, whether we fall within Southern Pacific or the Moore test, where this is a recurring controversy that's likely to evade judicial review.

We think that under any of those four standards in this case there can be -- we've met each of those four standards.

Super Tire sought a declaratory judgment, not an injunction, an effective decree that regulates the State policy as to both Super Tire and other employees is still possible. Super Tire is going to be affected in the future and that's what it sought to have determined, its rights both present and future by means of a declaratory judgment as to whether the State can engage in the payment.

There's nothing in this record to show this is a feigned or a hypothetical or an abstract controversy. Super Tire was harmed on one occasion, it will continue to be harmed. Other employers have been harmed and continue to be harmed.

This isn't a need for an advisory opinion, there's been actual injury in a live controversy that's taken place and continues to take place. And that's whether we regard this as a challenge to payments to strikes or availability of strikers.

The parties continually remain in the adverse posture. Super Tire has collective bargaining agreement, the

contract is up this year, new negotiations will start; there's a possibility of strike again.

More than that, we have the fact that over thirty percent of all strikes in this country take place during the contract term, notwithstanding no-strike clauses and the inhibitions on mid-term contract strikes of Boys Market and Gateway Call?.

The collective bargaining negotiation is more than something that takes place once every three years and stops. The continuing day-to-day ongoing relationship, and as long as strike benefits are payable to a striker, that's affected by the availability of the New Jersey policies that we challenge here, that both the First Circuit in ITT and Grinnell cases, the two-judge District Court in Francis, each of these courts was confronted by a mootness contention in the precise same situation we have here today, and each of those found the controversy not to be moot and that there was continuing relationship.

The Third Circuit said one strike of the length requisite to raise the issue has already occurred, and nothing in the record suggests the unlikelihood of future repetition.

We think that same principle is applicable to this case.

Finally, this case presents what we believe to be

a clear example of the continuing controversy, the type of controversy that might otherwise evade appellate review, of the type that this Court found to fall within the ambit of Southern Pacific and such cases as Moore v. Ogilvie and Roe v. Wade.

Strikes, on the average, as we point out in our reply brief, last eleven days. That's even a far shorter time than the period of pregnancy involved in Roe or the two-year ICC orders that were called short-term and evasive of review in Southern Pacific.

If this case is found moot, every challenge to State welfare laws on the basis of preemption in the country is likely to be similarly rendered moot before we can have an appellate decision.

An entire class of cases will be denied review, and avenues of appellate decision will be denied for an important State-federal controversy in an important preemption area.

QUESTION: Mr. Cohen, if you're challenging a New Jersey State regulation, doesn't the New Jersey court system provide some way for challenging that through a system of administrative appeal and then go to the court?

MR. COHEN: It can be challenged -- well, the challenge to New Jersey -- there is no -- it's not like Unemployment Compensation, as far as I understand, that you can bring an administrative determination to -- The administra-

tive determination has been made, the payments are being dispensed during the strike, we have no choice at that time but to go -- the only way we could enjoin those payments, to prohibit the strikers from getting them, and thereby not irreparably injuring our situation.

QUESTION: But a typical State Administrative Procedure Act will provide that a regulation can be challenged just on the declaratory judgment type of basis.

MR. COHEN: But this -- there was no -- the challenge here would have been -- whether there's such a procedure, I'm not sure, but the challenge in this case would have resulted -- There's been a decision by the New Jersey Department that administers the law. The State Attorney General has said has said that's a correct decision.

QUESTION: Well, why didn't you take that to the New Jersey courts?

MR. COHEN: Because what we're -- I suppose we could take it to the New Jersey courts, but the New Jersey courts would not be in position to say that, to agree with us, that what we are challenging here -- I suppose they could -- that what we are challenging here is a violation of a federal right.

QUESTION: But they're sworn to uphold the Federal Constitution, too, aren't they?

MR. COHEN: That's right. But that's not our

exclusive forum. We think the federal courts are the appropriate place, not necessarily the only place, but certainly the appropriate place for resolving questions of federal preemption.

QUESTION: Well, your mootness argument, then, really is that, when we're talking about evading review and that sort of a thing, that the mootness ought to be tailored so that you can, even with a short-lived controversy, get a review in a federal court every time the --

MR. COHEN: Well, presumably, if it's moot in the federal court, it would be moot in the State courts as well.

QUESTION: Well, I don't think -- if you recall the Doremus case some years ago in this Court, the Supreme Court of New Jersey apparently has different rules as to mootness than we have.

MR. COHEN: Well, the court, this Court has said on occasion that mootness of a preemption issue can be -- is a federal question, so that even if the State court, for example, had a different rule, this Court will still apply its own rule.

I think we could go to the New Jersey court. My feeling was, at the time, that that would be a futile act. The New Jersey courts have issued, not ruled on this question precisely, but there's certainly been determinations by New Jersey officials here.

We felt that this was presenting squarely an important federal issue that ought to be resolved, not just for New Jersey but generally, and that, therefore, our appropriate forum was, rather than go to the New Jersey courts, to go to the federal court. And that's why we commenced this action.

Now, the point I was making is that if that is going to be decided moot, whether under -- by reason of the fact that the strike is settled, then there is no way that we're ever going to be able to get, we or any other employer throughout the United States is ever going to get review of the question.

You're going to -- and going to this Court's opinion in Liner v. Jafco, that's the particular, that's the exact type of situation which should not occur when you're dealing with a preemption problem. Preemption issues are particular problems where the Court should be very careful to avoid hindrances in the way of decision.

And that's what we think, as I say, would be the result here, and would certainly be the result with an eleven-day average strike period, should this Court agree with the Third Circuit on mootness.

Before I turn to the merits, I just wanted to address the Oil Workers case, which is the basis for the decision below.

We don't think that case stands for the proposition that there's a distinct or different or new rule for labor controversy. Rather, we submit that that case was -- which was a situation involving the emergency seizure by the Governor of the State as to -- which is a discretionary power, of a public utility confronted in a labor situation.

The crux of that case, we think are threefold where it's different from our case:

First, the emergency discretionary speculative nature of any reoccurrence.

Secondly, the fact that if the Governor seized another utility, and there is no showing that some other plaintiff couldn't have come in, that didn't fall within the Southern Pacific doctrine.

And finally, and perhaps most significantly, the plaintiffs in that case had sought to enjoin only a specific act, namely the seizue of the utility. They did not seek, as we sought here, a declaratory judgment which would affect future as well as present rights.

For all those reasons, we think that the defendant in Oil Workers perhaps had met his burden of showing that there was no likelihood or reasonable expectation that the wrong would be repeated.

In this case we don't think the defendants have met this burden, that there's been continuing and irreparable

injury that continues to occur as long as there is the availability on the books, and that ought to be a controversy this Court ought to address.

QUESTION: Mr. Cohen, in Moore v. Ogilvie, which you cite, had the case been deemed moot from the beginning by the lower courts, or had it become moot between the time of the lower decision and this Court's proposed decision?

MR. COHEN: It came -- it was certainly moot before it reached this Court.

QUESTION: Isn't that somewhat different than to say that Moore v. Ogilvie, in effect, protects this Court's right to review a recurring problem, when the lower courts have decided it in a concrete non-moot context, as opposed to what you're asking here, which is basically that you start out in the federal District Court, your court of first jurisdiction, with something that may already be moot?

MR. COHEN: No, that's not what we have here. We had a controversy that when it reached the District Court it was not moot. The District Court here did not find it to be moot.

There was no -- there was no argument that it was moot before the District Court. The District Court decided it on the merits entirely, if --

QUESTION: Against you.

MR. COHEN: Against us.

QUESTION: Yes.

MR. COHEN: The District Court said that there was no way that we could ever prove that welfare payments to strikers constituted a substantial interference. It read the ITT v. Minter case in the First Circuit as ruling out any possibility that we could ever make proof to meet our -- the allegations of our complaint.

Now, subsequently, the First Circuit, in Grinnell, explicated ITT, to say that's precisely what it didn't mean ITT to say. So that I think there's no question that the District Court's reading of ITT, which was the basis for its decision, is wrong.

The District Court -- it was the appeal on their basis, similar to the appeal that the employer took in Grinnell and the same, where the District Court did the same thing, that was the basis for our appeal, and it was after -- four days after the District Court decision that the strike settled, and therefore raised the mootness controversy.

That's when the employees returned to work.

Now, there was a statement made at the hearing before the District Court that the employees had ratified the agreement and were going to return to work the next working day, which was Monday, the 28th.

But there was never any contention nor argument nor finding by the District Court that that mooted the controversy

at that point.

I'd like to turn to the merits of the case, which again I think are significant and worthy of decision, and which this Court should either decide or provide significant guidelines for these to the lower federal courts.

The crux of our position is this:

The federal labor law, the basis of the federal labor law is the voluntary, private --

QUESTION: May I ask you one more thing on the --

MR. COHEN: Sure.

QUESTION: -- mootness. This was Unemployment Compensation?

MR. COHEN: No, this is welfare assistance, State and joint Federal-State welfare.

QUESTION: Does it -- is the same argument about, arise about Unemployment Compensation?

MR. COHEN: The same mootness argument would arise. The Grinnell case --

QUESTION: No, how about the same preemption argument?

MR. COHEN: The same preemption argument was raised in Grinnell.

Now, I think that the Unemployment Compensation presents a similar different principle, in the sense that Unemployment is a direct tax on the employee, there is no

need standard. But I think the same general principle should govern in that type of case.

QUESTION: Well, there might be a completely different mootness argument.

MR. COHEN: No, I don't think it is, because in each case, in Grinnell, the Grinnell -- ITT involved welfare; Grinnell involved Unemployment Compensation.

QUESTION: Yes, but if you can pay -- you would certainly have a stake in what your rate's going to be. A continuing stake in what your rates are.

MR. COHEN: That's right. Except -- except in Grinnell, it wasn't directly charged to the employer.

QUESTION: But, anyway, this doesn't involve that?

MR. COHEN: This involves welfare. The Grinnell -- Grinnell was, it was taken out of a general pot, so that the employer there did not have to pay a particular share, as opposed to other States where it's directly taxed to a single employer. There was no argument to that.

The court found it not to be moot because of Southern Pacific, and because of the likelihood that there would be another strike involving the same employer. And that's really the basis of our position here.

QUESTION: Thank you.

MR. COHEN: I want to save a few minutes for rebuttal, but I would like to spend some time on our merit

argument.

The federal labor laws, we believe, is the core of the federal labor laws, the voluntary private adjustment of disputes. The federal labor law has set up a framework which indicates that certain types of conduct and the disposition of disputes, certain types of economic pressure by unions, secondary boycotts, violent to partial strikes are forbidden; but where there is no such regulation, it's an area which Congress has specifically intended to be free.

Congress, in order to decide which area is to be free and which area is to be prohibited, has waived the interest of employers, of unions, of the public, and of the employees involved.

Where the area has been decided to be free, where Congress has not regulated it, they needed the Labor Board in cases such as Porter or American Shipbuilding, or the States in cases such as Morton may impinge upon that area.

In Morton, for example, the State attempted to provide damages for certain types of union economic pressures, which the federal labor law had held to be lawful. This Court held such damage awards to be impermissible. That the State had interfered with the balance struck by Congress.

Now, we think that principle is similarly applicable here. A state by insulating one party from the economic disadvantages of a strike, by allying its treasury on the side

of the union's economic power, has tipped the scale. It's affected the balance.

A strike who's receiving substantial State welfare payments is going to have a different resolve and a different determination, and approach negotiations in a different manner than a striker who's not getting any money from the State.

QUESTION: How generous are these State payments?

MR. COHEN: Well, the estimate is -- according to the expert testimony contained in the Appendix, is they run anywhere from 30 to 70 percent, and maybe even higher in cases of the pre-strike takehome pay for strikers.

If you look at a striker's pre-strike takehome pay, --

QUESTION: Yes, but how about in New Jersey?

MR. COHEN: In New Jersey, there's no -- the record does not contain any evidence. The testimony we were prepared to put on shows that the benefits in this case ran 70 percent or more of pre-strike takehome pay. Based upon the wage rates for the employees involved, and the level of assistance in the State of New Jersey.

If the boys were making more money, it would have been a lower percentage.

QUESTION: Pretty affluent State, isn't it?

MR. COHEN: Well, this is not uncommon. As I say, the expert testimony is that that's pretty standard.

Now, this can increase, you've got other forms of

assistance, Unemployment Compensation, for example, that can also kick in, and you can have several different benefits.

New Jersey -- I think the important point here, two points, before I close:

The important point here is that New Jersey has created a special rule of law which is applicable only to strikers. These are benefits that would not be payable to any other person seeking benefits, seeking welfare in the State of New Jersey. Anyone else in New Jersey, who is physically or mentally capable of taking a job is ineligible for welfare assistance if he refuses to take the job.

A striker, by federal law, has a federally protected right to a job, and yet he is not taking that job.

Now, we submit that that is a special exception, not of general application rule, as the State would have urged, but a special exception that's been carved out only for strikers, and which necessarily affects the area which Congress designed to be free.

The second thing that I think is significant here is that what we're talking about is not something that would have existed and continued to exist before the strike, but something that has tilted the balance right before the beginning -- right at the status quo before the strike commenced.

And this type of interference, where the Governor of

the State has gone in and created a special policy that applies only to strikers and is a direct interference with State law, regardless of the State interests involved. I think this --

QUESTION: But you wouldn't object to welfare if employees were locked out, I guess?

MR. COHEN: I think that as long as the -- as long as the employees are engaged in a federally protected activity, if there's a permissible lockout, then they ought to get welfare assistance -- they ought not to get welfare assistance, and they ought not to get any State help.

I think that private parties can go in and always assist, the union is entitled to use its strike funds, it's entitled to get other assistance as well. But once the State gets involved in allying its economic power with the economic power of the union itself, then I think we've tipped the scale.

That's really the crux of our position.

There's been much discussion in the briefs about the federal policy on AFDC.

Let me say this again, that the AFDC program is no longer operative in New Jersey. The program that we think that the -- the only program in -- the only program now operating are State-funded programs; but, more than that, --

QUESTION: AFDC is not operative in New Jersey?

MR. COHEN: That's correct.

QUESTION: What did they -- did New Jersey withdraw from it?

MR. COHEN: New Jersey withdrew from the Youth Program of the AFDC, the one that benefits were payable under here.

Secondly, even if we go to the AFDC policy, for the reasons that we've covered in our reply brief, we think Congress has not sufficiently spoken in that area to give any indication of its intent.

I'd like to reserve the remainder of my time for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. O'Brien.

ORAL ARGUMENT OF ROBERT F. O'BRIEN, ESQ.,

ON BEHALF OF RESPONDENT TEAMSTERS

LOCAL UNION NO. 676

MR. O'BRIEN: Your Honors:

We represent the Respondent Teamsters Local Union. By leave of Court we've been permitted to divide our oral argument with the counsel, Deputy Attorney General, who represents the public officials in this matter.

The State has not argued mootness. We, hoever, have argued mootness.

We'd like to make several points, if we may, relative to the record below.

Initially, Your Honor, we would think that the Court, in reviewing this case, should have as its starting point the complaint which was filed by Super Tire.

If the Court examines the complaint, I think that the Court can see, in effect, that Super Tire was complaining not about welfare benefits in general but, rather, the granting of welfare benefits to the particular employees of Super Tire during the time that they were on strike. And I think that's rather important, since, in effect, I think it puts this particular lawsuit into a certain timeframe.

Additionally, Your Honor, at the hearing below, and I think this is important, Judge Kitchen in the District Court took no testimony. However, he did allow oral argument of all counsel, and it was at that time that we raised the issue that this case, in effect, was something that the court should not get into, under ITT vs. Minter.

But we also raised, Your Honor, and I think it's important, and it's in the Appendix rather clearly, that we raised the issue of mootness. We told the court at that time, in the Appendix I think it's rather clear, that the strike was over, that the day before the hearing, June 23rd, the employees voted to return to work, and that the employees were about to go back to work on the next working day. And employer counsel agreed that the strike had ended, and that the employees were making preparation to go back to work.

So, in effect, what we have is a suggestion of mootness, not on appeal, but a suggestion of mootness at the District Court level.

The United States --

QUESTION: Well, what do you have to say about Mr. Cohen's argument that, by definition, a striker is refusing to take available work and is therefore, under New Jersey law, automatically ineligible for New Jersey welfare relief?

MR. O'BRIEN: If Your Honor please, I'm going to defer to my co-counsel, the Deputy Attorney General, who will get into the merits of it.

I would simply note that you can also take the opposite view and in effect say that a man who exercises his federal right to strike, in effect, would be discriminated against by the State of New Jersey denying him welfare benefits is the argument that's been raised.

We would go on to ask the Court to particularly examine the rather erudite opinion of Judge Adams below, who pointed out that there are generally different kinds of mootness criteria which have been applied.

We'll take issue with counsel for the Petitioner, who says that the type of case involved is what's important. We think that the particular criteria spelled out by Judge Adams below are somewhat criteria which have always existed,

but which come up with different results, depending on the type of case.

Judge Adams put particular emphasis upon Oil Workers, and we think it was well placed.

Oil Workers, in effect, concerned a labor dispute where the State seized, or the State declared that a private employer was a public employer and therefore the employees had no right to strike.

By the time the case got up to this Court, the Court said the labor dispute is over. There we could again say that the Court would never really have that kind of a case before it, but yet, three years later, the labor dispute continued in Bus Employees vs. Missouri, and the Court did get an opportunity to review the case.

So what I'm suggesting to the Court is that we're not faced with the situation where this is continually evading review.

There's a case now pending in the Eastern District Court for Michigan, where the strike itself has continued for two years. So we're not faced with something which was pointed out in ICC vs. Southern Pacific that's going to continually evade review; rather, we think this is something that the Court should really decline to look at and decline to act upon under the Article III clause that we've got to have a concrete case.

QUESTION: You say all the employer has to do is wait for a good, long strike.

MR. O'BRIEN: Well, I think the employer has got to be personally affected by what's going on, that he has got to have something, harm befalling him, and I don't think we have the harm befalling Super Tire, at this posture of the case.

In effect, Super Tire claims that there's a continuing effect upon it, but then, in Oil Workers the employees said they could have a continuing effect upon them since they didn't have a right to strike.

But the Court said that's somewhat speculative.

And here, too, we think to say that the employees, that this employer has a continuing controversy and that the case is still alive ignores the realities of the situation. We, as the union, have a contract with this employer. We're at peace with the employer. We don't feel that we have an antagonistic interest with him.

The State of New Jersey, as such, is not doing anything to this employer.

We would also point out to the Court, in Oil Workers, Mr. Justice Stewart pointed out a very good point, that if the Court acted, they could not really issue an effective order, because, in effect, in Oil Workers, the labor dispute was over.

Here, too, if the Court were to issue an order, it would be ordering the respondent State officials to do that which they've already done, which is already done with. They would be ordering them to -- would be ordering them not to make welfare payments to the particular employees involved. And, as such, it would be impossible to do anything, because, quite frankly, they're no longer making these welfare payments.

We would therefore think the case of Oil Workers, and the four criteria relied upon by the judge below, Judge Adams, should be affirmed.

I think, in closing, on the mootness issue itself, I think the words of Judge Adams are quite --

QUESTION: Although in doing that you would lose your favorable decision in the District Court.

MR. O'BRIEN: I'm sorry, Your Honor, I don't understand.

QUESTION: Well, it was vacated.

MR. O'BRIEN: The decision below was vacated in the District Court, and a new order was told to be entered by the --

QUESTION: To dispose.

MR. O'BRIEN: Yes, that's correct, Your Honor.

QUESTION: Unh-hunh.

MR. O'BRIEN: In effect, the words of Judge Adams, that a court acts only when called upon to act, can it

legitimately act at all.

Here, I don't think the Court can say that it's really required to act, since the strike has ended, since this matter has now, in effect, terminated between this employer and this employee, these employees; and we would therefore ask the Court to look at the four criteria, to look at Oil Workers, which is very, very applicable in the rationale, and in effect declare this case to have been mooted out below.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Skillman.

ORAL ARGUMENT OF STEPHEN SKILLMAN, ESQ.,

ON BEHALF OF RESPONDENTS McCORKLE AND ENGELMAN

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

The single issue on the merits of this case is one of congressional intent.

Has Congress expressed the intent to prohibit the payment of welfare benefits to strikers?

I think the Petitioner would agree with that formulation of the issue.

QUESTION: What is the State's view on the mootness issue?

MR. SKILLMAN: Your Honor, the State is in a somewhat anomalous position on it.

QUESTION: Well, just briefly, I mean, do you say it's moot or not?

MR. SKILLMAN: We would say that if our analysis of the merits of the case is correct, i.e., that you look to the -- I don't mean ultimately on the merits --

QUESTION: Yes.

MR. SKILLMAN: -- but I mean as to what you look to.

QUESTION: I see.

MR. SKILLMAN: The general legislative history. This is a question of abstract general law applicable across the board, and not depending on the particular facts and circumstances of the 1971 strike.

QUESTION: You don't represent the State, do you?

MR. SKILLMAN: Yes, I do, Your Honor. The State officials: the Commission of Institutions and Agencies; and the Director of the Division of Public Welfare.

But we have not urged at any point in this litigation, Mr. Justice White, that the case should be disposed of on grounds of mootness. We haven't gone to the other extreme of taking -- of taking issue with it. We have just not taken a position on this issue.

MR. CHIEF JUSTICE BURGER: We will pick it up there after lunch.

[Whereupon, at 12 o'clock, noon, the Court was recessed, to reconvene at 1:00 p.m., the same day.]

AFTERNOON SESSION

[1:00 p.m.]

MR. CHIEF JUSTICE BURGER: Mr. Skillman, you may continue.

ORAL ARGUMENT OF STEPHEN SKILLMAN, ESQ.,

ON BEHALF OF RESPONDENTS McCORKLE and ENGELMAN

-- [Resumed]

MR. SKILLMAN: May it please the Court:

As I started by indicating, prior to the luncheon break, I think that the State is on common ground with the Petitioner in saying that this case on the merits involves an issue of congressional intent.

Our area of disagreement, however, is whether, in ascertaining that, the intent of Congress, the Court should look to the National Labor Relations Act as urged by the Petitioner, or whether, as urged by the State, it should look to the federal categorical assistance provisions of the Social Security Act.

If Congress had not dealt comprehensively with the subject of welfare in the Social Security Act, then it would be arguable, certainly, that the Court should look to the National Labor Relations Act, look to certain underlying principles in the National Labor Relations Act with regard to collective bargaining, whether or not those principles require a principle of neutrality by the State in labor

disputes, and whether or not there's an important countervailing State interest, as we certainly would say that there is, in providing assistance to the needy.

However, the primary welfare programs in effect in this country today are themselves federal programs, enacted by Congress, as was the National Labor Relations Act.

And since the provisions of the Social Security Act, dealing with those welfare programs, specifically outline conditions of eligibility for the receipt of welfare, rather than -- it is to these provisions enacted by Congress, rather than the general provisions of the National Labor Relations Act, dealing with collective bargaining, that the Court should look in ascertaining whether or not it was the intention of Congress to prevent the payment of welfare to needy individuals who happened to be on strike.

Now, when you look to the Social Security Act, you find no such expression of congressional intent. Rather, with the main federal categorical assistance program and the one remaining principal federal categorical assistance program still in effect in New Jersey, that involving the so-called one-parent household, there are two criteria of eligibility:

One, that a parent be dead, absent from the home, or disabled; and

Two, that there be the requisite need.

Now, for the Court to hold that there is a dis-

qualification from the receipt of benefits under this program for strikers, it would in effect have to read into the Act a further condition of eligibility, which is simply not in the provisions of the Federal Social Security Act.

QUESTION: Has there been any practice in New Jersey before New Jersey withdrew from AFDC, payments in situations like this under AFDC?

MR. SKILLMAN: Your Honor, it's my understanding, and its difficult to piece this back before '57, which is the date of the regulation in question here, but it's my understanding that New Jersey, under the federal categorical assistance program, has never disqualified strikers.

QUESTION: Unh-hunh.

MR. SKILLMAN: There --

QUESTION: "Never" goes back how far?

MR. SKILLMAN: "Never", I assume back to 1935. But my source of knowledge is --

QUESTION: My recollection is not that.

MR. SKILLMAN: My source of knowledge, as I say, is memoranda, internal agency memoranda from the middle 1950's, which indicate that that was the case with respect to the federal categorical assistance programs.

QUESTION: That's the middle 1950's?

MR. SKILLMAN: That's the date of the memoranda which, I say, are my only vision of what occurred prior to

the middle Fifties.

QUESTION: Unh-hunh.

MR. SKILLMAN: But those memoranda indicate that benefits have been paid under the federal categorical assistance program, but not under State general assistance. And it was because there was considerable controversy with respect to the State general assistance that we had several bills that went into the State Legislature in the middle 1950's, and finally the regulation, which has become the focus of this case, and which, although by its terms, is only applicable to State general assistance, has, as a matter of administrative application, been applied to the federal categorical assistance programs as well.

QUESTION: Mr. Skillman, Mr. Cohen, in his presentation, suggested that by definition a striker was ineligible under New Jersey statutes because New Jersey limited payments to a person who was ready to accept work if that work was available, and again by definition a striker is rejecting work which is available. What have you to say about that, in terms of the New Jersey statutes?

MR. SKILLMAN: Your Honor, first of all, with respect to New Jersey's participation in the federal categorical assistance programs, which is the main part of this case, we are of course required to abide by federal requirements and not by State requirements, except to the extent that the

State may have the option to augment or supplement federal requirements.

But my understanding is that under both the applicable federal and State provisions, that there ordinarily -- and there are certain exceptions to this; but ordinarily an applicant for assistance must be prepared to seek and accept work.

And I don't think that a striker would be any exception to this. In other words, he has an obligation to seek and accept work other than work with the employer from whom he is striking.

QUESTION: Well, who puts in this "other than"; is that your reading of the statute, or is that -- does the statute say "other than"?

MR. SKILLMAN: No. All the statute says is that anyone who applies for categorical assistance or general assistance must be ready to seek and accept employment.

QUESTION: Yes. Well, now Mr. Cohen's point is that a striker is automatically ineligible because he is refusing to work in a very vigorous way, isn't he?

MR. SKILLMAN: Well, he's refusing to work for one particular employer. He is not refusing to work for another employer, and it's not that uncommon for someone who is out on strike, particularly when you're speaking about a lengthy strike, to --

QUESTION: What I'm trying to get at: who writes in this exception that you're talking about? Where does that come from?

MR. SKILLMAN: I don't think that it is an exception. I think, on the face of the statute there's an obligation of any applicant for assistance to seek and accept employment. That is not limited to any particular employer. And the --

QUESTION: Well, what's New Jersey's position on that?

MR. SKILLMAN: New Jersey's position on that is that the striker may be called upon to seek and accept employment with an employer other than the employer from whom he's on strike.

QUESTION: Well, we're going around in a circle. Where does New Jersey get the authority for making the exception, if the statute is as Mr. Cohen described it?

MR. SKILLMAN: Well, I think that all the statute says --

QUESTION: That he is to accept work if available.

MR. SKILLMAN: That is correct.

QUESTION: And he is declining to accept work which is available with his regular employer, is he not?

MR. SKILLMAN: That is correct. With his regular employer, but not -- but not generally refusing to accept employment.

QUESTION: Well, each time you come back and I'm still unenlightened. You write an exception into the statute for the particular employer who has been struck. What is New Jersey's position on that issue?

MR. SKILLMAN: Well, the position has to be that the employee is permitted not to -- not to go back to work with that particular employer. And I think that the foundation for that position by the State of New Jersey itself draws sustenance from the National Labor Relations Act.

QUESTION: Well, this has to mean, I gather, that if the only possible work available is at the struck plant, that he's striking, New Jersey nevertheless pays him welfare payments, because New Jersey does not require him to accept work at the struck plant; is that it?

MR. SKILLMAN: That is correct as --

QUESTION: Well, I gather what the Chief -- and I'd be interested, too. Is this a matter of administrative interpretation of the requirement, or is there a --

MR. SKILLMAN: It's certainly a --

QUESTION: -- New Jersey court decision that says this?

MR. SKILLMAN: There's no court decision on this point, Your Honor.

QUESTION: Unh-hunh.

MR. SKILLMAN: And certainly on the face of the

-- in the face of the regulation, which is the focus of the case, all that regulation says is that an individual is not disqualified from receiving welfare benefits by virtue of being on strike. It doesn't go on and deal with the various situations which may arise under the -- satisfying the various conditions of either federal or State statutes.

QUESTION: Do I understand you, Mr. Skillman, to say that if New Jersey did disqualify him, at least in so far as the federal categorical assistance programs are concerned, New Jersey would violate the provisions of the federal requirements?

QUESTION: No. No. No.

MR. SKILLMAN: Well, the federal requirements are quite -- are quite similar with respect to an individual being willing to accept work, so I would say no.

QUESTION: That's what I thought. So that New Jersey could disqualify him because he refused to accept work, without violating any federal statutes.

MR. SKILLMAN: That is correct.

QUESTION: So that there's no -- there would be no conflict at all between the federal welfare laws and the labor laws, if he was disqualified?

MR. SKILLMAN: No. No, there would not.

But that has not been the focus of -- of this case.

QUESTION: Well, some of the argument is that you

should look to the welfare laws for guidance here, not to the labor laws. Well, if you look to the federal labor -- the federal welfare law, which is thought to preempt here, or thought to require -- or thought to be forceful enough to preempt the labor requirements. If you look to that, there's just no conflict between that and the labor law, is there?

MR. SKILLMAN: Well, when you say that and the labor laws, there's certainly a great conflict between the provisions of the Social Security Act and what the Petitioner would like to read into the labor law.

QUESTION: Why?

MR. SKILLMAN: Because the federal Act requires two principal criteria of eligibility: one, that you have the one-parent home; and, No. 2, that there be need.

QUESTION: Yes.

MR. SKILLMAN: Once those two criteria are satisfied --

QUESTION: I know, but I just asked you if a man -- if a man refuses to take a job, is there need?

MR. SKILLMAN: There still is need, certainly.

QUESTION: I know, but it doesn't -- it wouldn't -- you just told me it would not violate the federal law if this man was disqualified.

MR. SKILLMAN: Individually he may be disqualified. His family may not be disqualified. So that you're talking --

in other words, in that type of situation, if I can get away for a second from the labor part of it, let's just take an individual who refuses to work. He says, I don't want to work.

QUESTION: Yes?

MR. SKILLMAN: The family may still receive assistance under the federal categorical assistance program.

QUESTION: Right.

MR. SKILLMAN: That particular indolent individual will not -- his needs will not be included in the calculation of the needs of his family.

QUESTION: But New Jersey includes him?

MR. SKILLMAN: Well, New Jersey would not include him if in fact he has not taken available work. New Jersey requires, as does the federal --

QUESTION: But you don't interpret a strike -- staying away from work on account of a strike as refusing to take available employment?

MR. SKILLMAN: That is correct.

QUESTION: Unh-hunh.

MR. SKILLMAN: That is correct.

QUESTION: Although the federal law would not -- it would not be inconsistent with federal law if you did disqualify him?

MR. SKILLMAN: Not inconsistent with federal --

QUESTION: -- law if you did disqualify him.

It would be consistent with federal law if you did disqualify him.

MR. SKILLMAN: I think it would be consistent with the Federal Social Security Act to disqualify the individual, but not his family, --

QUESTION: Okay.

MR. SKILLMAN: -- if he's available for work. But we get right back around to the same question, and that is: what's the meaning of refusing to take available work?

And when you have a strike situation, can it fairly be said that there is available work? Taking into account, as the Petitioner would have the Court in other respects, taking into account the policies which underlie the National Labor Relations Act, which make it permissible --

QUESTION: Let me say this: Now, that interpretation is by virtue of a regulation, that construction is by virtue of a regulation of the New Jersey Welfare Department? Or just their policy, their attitude?

MR. SKILLMAN: In terms of "available for work"?

QUESTION: Yes.

MR. SKILLMAN: It's my understanding that this is the policy of the New Jersey Division of Public Welfare, not expressed in regulation, and that it is also the position with respect to the federal categorical assistance programs of the Department of Health, Education, and Welfare.

So that it is not -- we are not talking here about position of the State of New Jersey alone, but I think a position in common with that held by the Department of Health, Education, and Welfare with respect to the meaning of "available for work".

And as I say --

QUESTION: Mr. Skillman, I gather that all that New Jersey's withdrawn from, effective June 30th, '71, is the unemployed parent segment of AFDC.

MR. SKILLMAN: That is correct.

QUESTION: New Jersey still participates otherwise in the AFDC program, and the --

MR. SKILLMAN: The other parts of the program that it participates in are the principal parts of the program.

QUESTION: Yes.

MR. SKILLMAN: In the present time in New Jersey we have 422,000 people on AFDC.

QUESTION: But so far as unemployed parent segment is concerned, to the extent he's covered, he's covered under New Jersey's own Assistance to Families of the Working Poor?

MR. SKILLMAN: That has taken the place, as of July 1, 1971, of the unemployed parent segment.

QUESTION: All right. Now, the regulation that we have here is a regulation -- what -- applicable to that State program, Assistance to Families of the Working Poor?

MR. SKILLMAN: By its terms, it's applicable only to general assistance, which AFWP does not technically fall under.

QUESTION: Yes.

MR. SKILLMAN: As a matter of administrative application, it is applied to general assistance, to AFWP and to the federal categorical assistance program; so it's, as a matter of administrative application, it's applied across the board.

QUESTION: I don't see what -- how it's applicable to the unemployed parent segment of the AFDC program, if you've withdrawn from it?

MR. SKILLMAN: Well, we're not -- it doesn't apply to programs that we're not participating in, but it's applicable to all programs the State of New Jersey is participating in.

QUESTION: Where the unemployed parent is a consideration.

MR. SKILLMAN: No, it's not -- that's the one program --

QUESTION: You know, Mr. Cohen suggested that if we get to the merits, we ought to decide it here without sending it back. For the life of me, everything you've said only indicates more forcefully than even that if we agree that this case is not moot in the first instance, we better

send it back and let the three-judge court wrestle with it. They'll know a lot more about the New Jersey situation than we can possibly know, including me.

MR. SKILLMAN: Your Honor, if I may briefly direct myself to that question, because I think it's important.

I think that when this case is fully analyzed, it will be shown that the case really turns on an analysis of the meaning of the federal statutes, but most specifically the Federal Social Security Act.

If we're wrong in this, and if the case requires factual development, then I think it's obvious this Court can't decide the case --

QUESTION: Well, I think it may involve more than that, it may involve some questions of the construction of the New Jersey statutes.

MR. SKILLMAN: Likewise if it involves those sorts of questions, I again agree the case would have to go back before the Court could reach the merits --

QUESTION: Well, it's my suggestion that some of the things you've been saying to us indicate that the matter of construction of the New Jersey statutes may be very significant.

MR. SKILLMAN: I may, Your Honor, have -- to the extent that my response to certain questions may have suggested that there is not a congruence between the New Jersey statutes

and federal statutes, and between New Jersey administrative interpretations and federal HEW interpretations, I think I might have suggested that.

But I think that that is incorrect. That essentially all that New Jersey is doing with respect to both the federal categorical assistance programs and its own State-created programs is what is required by the Federal Social Security Act, and what has been recognized to be required by the Federal Social Security Act.

QUESTION: That's what we held in Davidson v. Francis, isn't it, in affirming per curiam that District Court decision from Maryland?

MR. SKILLMAN: Well, I think that there is some dispute as to exactly what the Court did hold there, because -- and I think that the Petitioner rightly points out in his Reply Brief, that the jurisdictional statement filed by the State of Maryland did not specifically raise the issues that are being raised at this time; a jurisdictional statement filed by the Chamber of Commerce did, however. But, as a technical matter, that was dismissed on procedural grounds and not on the merits.

So, as a very technical matter, it may be said that this Court hasn't already reached this issue in Davidson, so I think --

QUESTION: Well, what do you think was decided in

Davidson?

MR. SKILLMAN: Oh, I think that that case involved specific questions of interpretation of the unemployed parent segment of the AFDC statute.

QUESTION: Right. And we held that it was -- the District Court held, and we affirmed it, as I remember, that Maryland was required, under the federal statute, to make payments to unemployed parents who were unemployed by reason of a labor dispute. Isn't that correct?

MR. SKILLMAN: I think that's what the Court held, but I would have to concede that that District Court opinion is difficult reading, it can be read to have dealt solely with the conformity of what Maryland was doing with certain federal regulations, without going through to the next step of examining the provisions of the Social Security Act, which those regulations were predicated on.

It's a difficult decision.

QUESTION: Unh-hunh.

QUESTION: Mr. Skillman, you have said that there is a distinction, for purposes of your discussion, between a party on strike and an able-bodied person not on strike who just, nevertheless, refuses to take a job.

I'm thinking about how you would define who is on strike.

Assume for a moment that you had a supervisory

employee who just decided he didn't like his employer, and he quit and came into the Welfare Office and said, "I'm on strike, I'd like to collect my welfare check."

What would New Jersey do with respect to a fellow like that?

MR. SKILLMAN: Well, first of all, Your Honor, if I may answer that by correcting what I think is perhaps a misconception. He doesn't -- he wouldn't come in to the New Jersey Welfare Office and say, "I'm on strike"; he'd come into the New Jersey Welfare Office and say, "I'm needy."

And the only question would be whether or not New Jersey should disqualify a needy individual who otherwise would be eligible simply because of the fact that the reason for his being needy is that he is on strike. And New Jersey wouldn't draw any distinction between the lockout situation, the supervisory employee situation, the employee who was on strike but had dissented on the vote as to whether or not a strike should be taken, and the employee who had voted to go on strike.

In either instance, what New Jersey would look to, and what I think the Federal Social Security Act would require New Jersey to look to under its provisions, is: Is the individual needy? That's the --

QUESTION: If you concluded this supervisor was in need, even though a job were still available for him, and

he were able-bodied and he said, "I'm out on strike"; if he were in need under those circumstances he'd receive welfare benefits?

MR. SKILLMAN: Well, you're talking about the individual who is, in effect, refusing to cross the picket line.

QUESTION: No, I'm talking about a man, there's no strike except his own private little strike; he says, "I just don't like to work there."

MR. SKILLMAN: I would think, although those sections are not involved here, I would be quite sure that the State would find that individual to be disqualified as not being willing to take available work.

QUESTION: Do you see any equal protection implications in drawing the line you suggest?

MR. SKILLMAN: We have not suggested any federal equal protection consideration in this case.

QUESTION: I know you have not, but I ask whether you saw any such implication?

MR. SKILLMAN: I can conceive of factual circumstances in which there might be. But that's not what we're relying on here.

QUESTION: But you would qualify everybody who's protected by the Labor Act and disqualify everybody who isn't?

MR. SKILLMAN: That -- that, I think, is the line

that New Jersey would take. It's not what is said by the regulations before the Court.

QUESTION: Oh, it isn't. You said, but that's the line you think that would --?

MR. SKILLMAN: That's the line I think the State would take as a matter of interpretation of the underlying federal and State law.

QUESTION: You think that would present no equal protection problem?

To clarify it, the man who's on strike against the world as against the man who's on strike against a particular employer. Do you think that New Jersey may say yes, if you're striking against Westinghouse Electric, you're qualified to receive welfare; but if you're just on strike because you're mad at the world, we won't give it to you.

MR. SKILLMAN: Well, the striker who's on strike against an employer is doing something that has certain protection under the National Labor Relations Act. That's not true of the individual who has his own private war with respect to some private interest.

QUESTION: Maybe he's got a First Amendment right not to work.

MR. SKILLMAN: Conceivably. Conceivably. And then I can -- maybe there would be an equal protection question if he could spell that out. But I think I would have some

difficulty with that.

Thank you.

MR. CHIEF JUSTICE BURGER: You have about four minutes left, Mr. Cohen.

REBUTTAL ARGUMENT OF LAWRENCE M. COHEN, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. COHEN: I'd like to spend those four minutes, I think, trying to unravel some of the confusion which Mr. Skillman has perhaps left the Court with.

There's a clear regulation in New Jersey which is contained on page 129 of the Appendix, that has been in effect since 1957 in the State of New Jersey, which governs the State welfare programs of New Jersey, which is the main part of this case.

QUESTION: Now, --

MR. COHEN: Yes?

QUESTION: -- didn't Mr. Skillman -- I thought he said the main part of this case was the federal categorical assistance program.

MR. COHEN: That's where he's wrong.

QUESTION: I see.

MR. COHEN: The strikers did not receive benefits in any substantial amount under the AFD -- ADC program, single-parent household. The likelihood of a single parent being absent from the house because of a strike, there is no

unemployed provision under that section.

Strikers became eligible for federal welfare assistance and became -- and started collecting it in substantial amounts only with the adoption of the Youth Program. The Youth Program is the key to federal welfare assistance to strikers.

Their program provides, specifically, that anyone who is involuntarily unemployed, the term that's used in Unemployment Compensation laws to bar strikers, and who does not refuse work for good cause -- a term that's limited to physical disabilities or safety hazards -- collects benefits.

And unless you are going to make an exception to strikers, which is what New Jersey has done under their Youth Program, then you are, under federal law, not eligible for assistance; because "for good cause" does not include participating in a labor dispute, unless you want to define it that way.

What New Jersey has done is to finance federal program, the Youth Program, when it had it, and define its State programs, which it still has, consistent with the regulations contained on page 129, which is to make a special rule for strikers.

And that's what we're attacking.

QUESTION: He said that HEW has agreed with that.

MR. COHEN: HEW said: we will approve any State

program, whether it pays strikers or doesn't pay strikers; we're not going to at all get involved in the decision, under Francis.

Now, incidentally, in Francis, the District Court now has dissolved that injunction, since HEW has passed new rules which permit -- and permitted Maryland to go ahead and refuse to pay strikers.

QUESTION: They either pay or not pay.

MR. COHEN: Either pay or not pay.

QUESTION: And so --

MR. COHEN: They said: we're not going to get involved in the constitutional question here, we're going to let the States do whatever they want in this area.

QUESTION: Right. And that's the present regulation, as I understand it, of HEW.

MR. COHEN: That's correct. They're contained in the Appendix.

QUESTION: So that what New Jersey has done, wrong as somebody might think it is, is perfectly within its power to do, so far as HEW goes --

MR. COHEN: As far as HEW --

QUESTION: -- and certainly so far as its own State policy goes, and the only question is whether it's conceivably unconstitutional, is violative of the equal protection clause, or some other provision of the Constitution; or whether it is

invalid because of the federal labor legislation. Isn't that it?

MR. COHEN: That's correct. That's correct.

And what we're saying here comes down to this: the federal labor law creates -- has a policy of not having governmental participation in strikes. The federal welfare law has a policy of only providing money to those who are involuntarily unemployed.

Those two statutes can be reconciled and harmonized by not paying welfare to strikers.

But if you go ahead and pay welfare to strikers, then what you have done is interfere with the labor law and deviate from the general policy of the welfare law.

That's a construction of the law which serves the purposes of neither Act, and conflicts with the purposes of both.

QUESTION: Do you think there's any need for the State courts of New Jersey to determine whether the policy of the State welfare authorities in New Jersey is consistent with the State statutes?

MR. COHEN: I don't think so. The regulation has been in effect in New Jersey since 1957.

QUESTION: Now, your friend, speaking for New Jersey, says that it was not a regulation but merely an attitude or a policy.

MR. COHEN: Well, I think it's contained on page 129 of the Appendix, and it spells it out pretty clearly.

QUESTION: Well, I know, but you want us to interpret it. Why should we interpret it?

MR. COHEN: No, I don't -- because the regulation is clear and concise and I don't think there's any --

QUESTION: Well, that's your view of it.

MR. COHEN: Well, I don't think it's open to any possible interpretation, it's never been interpreted in any other way. It says specifically: strikers get welfare benefits.

QUESTION: I imagine the three-judge court -- was this a three-judge court?

MR. COHEN: No, it was a single judge.

QUESTION: A single judge. Who was it?

MR. COHEN: Judge Kitchen in --

QUESTION: Well, he's now dead, isn't he?

QUESTION: Do you think it applies to legal and illegal strikes alike?

MR. COHEN: I think it applies to any strike that's protected -- that's consistent with a strike under the National Labor Relations Act.

QUESTION: Well, it isn't protected --

QUESTION: Well, the regulation doesn't say that. It says: A strike when lawfully authorized and conducted.

MR. COHEN: I'm sorry, I meant -- I meant my interpretation read in the regulations.

QUESTION: Well, if it's not --

QUESTION: When is it lawful? When is it lawful?

MR. COHEN: Well, that's what the State should not get into. The State shouldn't get into the policy of saying, We're going to pay some strikers but not other strikers; we're going to pay people who are lockouts but not in other kinds of disputes.

That's the kind of decision that ought to be made under federal labor law by the National Labor Relations Board and not by State agencies.

I see my time is up.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 1:29 o'clock, p.m., the case in the above-entitled matter was submitted.]

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