In the

Supreme Court of the United States

ULYSSES VERNON BEASLEY, et al.,

Petitioners,

vs

No. 72-1597

FOOD FAIR OF NORTH CAROLINA, INC., et al.,

Respondent.

Washington, D. C.
February 19, 1974

Pages 1 thru 40

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v.	:	No. 72-1597
FOOD FAIR OF NORTH CAROLINA, INC., et al. Respondents.	:	

Washington, D. C.

Tuesday, February 19, 1974

The above-entitled matter came on for argument at 11:55 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:

LARRY L. EUBANKS, ESQ., 503 North Carolina National Bank Building, Winston-Salem, North Carolina 27101, for the Petitioners.

RALPH MADISON STOCKTON, JR., ESQ., Hudson, Petree, Stockton, Stockton & Robinson, 610 Reynolds Building, Winston-Salem, North Carolina 27101, for the Respondents.

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 72-1597, Ulysses Vernon Beasley, et al., against Food Fair of North Carolina.

Mr. Eubanks.

ORAL ARGUMENT OF LARRY L. EUBANKS, ESQ.

ON BEHALF OF THE PETITIONERS

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

This matter comes on to be heard here on Writ of Certiorari from the State of North Carolina, and simply involves our Right-to-Work Law and the relationship of that Right-to-Work Law with the Federal substantive and the Federal National Labor Relations Act.

The factual situation is one where three individuals who were employed at some food stores in North Carolina were terminated right after a union election that was conducted by the National Labor Relations Board.

Now, our Right-to-Work Law provides simply that in North Carolina a person who has the right to live has the right to work there, but after the union won the election these three individuals were fired.

It is our position simply that there is a coexistence that is possible between a Right-to-Work Law in the State of North Carolina that protects supervisors and a Federal law which

protects employees.

Now, the cases dealing with the right of people that belong to unions, and whether or not there is a Constitutional right for that approach,have been dealt with many times by this Court.

First of all, in the Morton case, back in 1940 -- in Thomas V. Collins in 1945, the Court stated that, "Union membership is protected by the right of association under the First and Fourteenth Amendments."

Well, what that meant, as has been interpreted later, was that is true so long as there is no Government interference. In other words, Government interference can't interfere with the right of association.

And that gave rise to a lot of cases involving people excluded from coverage under the National Labor Relations Act, for example, teachers, garbage workers, and a lot of cases they have extended up into the present time.

Well, it is our position, simply, that in North Carolina, as in about nineteen or twenty other States, we have a law that says one other group of people, and that is supervisors, have a right to belong to a union.

Now, it doesn't say, nor does our law say, that a company or an employee is required to bargain with anybody because that's been covered by the Federal law.

It simply provides that everybody in North Carolina

has a right to belong to a union without fear of being fired.

Now, if, in fact, this case is pre-empted or the State law is pre-empted by Federal law, then I would agree with the defendant and respondent in this case that the State courts have no business dealing with it.

But it is really our position that this Court in 1967, in the Hanna case, has already answered this question. We submit that the Hanna case, in Section 14(a) of the National Labor Relations Act, really determines and answers the question whether or not a supervisor can join a union, and damages for his discharge because of his union membership can be given in a State court.

And that is the question we have here.

In the Hanna case, the Court dealt with Section 14(a), and I would like for the Court, if I might, to point out all the roles of 14(a) of the National Labor Relations Act, and it reads this way, and I quote: "Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization."

But the second phrase of that same section is what the Court exactly dealt with in Hanna Mining Company. That statement says, "But no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining."

Now, the point I am making by reading this to the Court is this. First of all, Congress says, when it removes supervisors from the coverage of the National Labor Relations Act in 1947 by the Taft-Hartley Amendment, supervisors can still belong to unions, but no longer will employees be required to bargain collectively with unions made up wholly or partially of supervisors.

Now, if that approach is maintained under the Federal scheme presently, it is our position that there is no conflict with our Right-to-Work Law and a protection of a supervisor and the Federal scheme or the Federal law as passed in Section 14(a).

And, this is why. In 1964, in the Morton case, this Court dealt with Federal pre-emption. The Court has dealt with it many times, but I am referring to cases generally cited in our brief.

MR. CHIEF JUSTICE BURGER: It is 12:00 o'clock, counsel.

(Whereupon, at 12:00 o'clock, noon, oral argument in the above-entitled matter was suspended for luncheon recess.)

AFTERNOON SESSION

(1:00 p.m.)

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

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

Thank you, very much.

You will recall that just before the luncheon recess I quoted to you a quotation from a case called Thomas V. Collins which provides "union membership is protected by the right of association under the First and Fourteenth Amendments." That was a 1945 case and it was in that posture of the situation that Congress chose to amend the Wagner Act, as it was then called, with the Taft-Hartley Amendment.

Now, I think it is reasonable for the Court -- and we submit to the Court it is reasonable for us to assume that Congress, when it included 14(a) into the Act it had some reason for all the words it put in that provision.

You will recall that I read to you just before the recess, also, Section 14(a).

The only time I can find a case in which the Court had the actual situation where 14(a) was in issue is the case called Hanna Mining, which occurred in 1965.

In that case, the Court talks about the Garmon decision, the 1959 decision of this Court -- which I am sure the

Court deals with it often in pre-emption, setting out that -- in effect, that conduct which is protected or by Section 7, or prohibited by Section 8 of the National Labor Relations Act, is certainly pre-empted from any State control.

But then that case and the Hanna case mention that there may be some other areas in which it may be better that State regulation not apply.

Now, I would like to point out that one quote from Hanna Mining which reads that "the ground rules for pre-emption in labor laws emerging from our Garmon decision" -- the case I just mentioned -- "should first be briefly summarized. In general, a State may not regulate conduct arguably protected by Section 7 or prohibited by Section 8 of the National Labor Relations Act." End of quote.

That's clear. And it has been clear since the Garmon decision.

In Hanna Mining, the Court goes on to point out, "The legislative purpose may further dictate that certain activity, neither protected nor prohibited, be deemed privileged against State regulations," and continuing, "for the reasons that follow, we believe the Board's decision that Hanna engineers or supervisors removed from this case most of the opportunities for pre-emption." End of quote.

Now, it is right there, if the Court please, that the appellant, plaintiff, in this case, rests its position.

In the Hanna case, the Court dealt with a situation where some supervisory engineers were attempting to picket to obtain recognition from an employer. The employer, really, in that case, just said well, I don't believe you represent a true majority. It didn't take, really, the position that was ended up -- to start with.

But, in that situation, the Hanna engineers were doing exactly what the last part of Section 14(a) of the National Labor Relations Act says it cannot do. In other words, that it cannot -- no employees subject to this Act shall be compelled to treat supervisors as employees for the purpose of collective bargaining.

And the Hanna engineers were simply trying to get this employee to do exactly that.

Well, in the Hanna case, the Court mentions that it is not dealing in that case with the situation where a person could become a supervisor and be fired for being a union member.

So, it, specifically, is not dealing with that situation. This Court did.

Well, the situation we have before this Court right now is the one the Court, in Hanna, said it wasn't going to deal with in that case.

In 1967, a case called U.S. v. Morton, before this Court, pointed out that -- or Teamster Local v. Morton is in 377 U.S., in dealing with the question of pre-emption, 1964, I am

sorry -- it says to explain the pre-emption doctrine further, "The answer to that question ultimately depends upon whether the application of State law in this kind of case would operate to first trade the purpose of the Federal legislation." End of quote.

Now, we submit to the Court that in light of Hanna-- the Hanna case, and in line with the statement in the Morton case, explaining what is and what isn't pre-empted, that the activity of these three individuals who signed membership cards for the union and were fired as a result thereof, is not the kind of activity if regulated by the State would first trade the National Labor policy.

Q Did the State Court identify any particular provision that the State law was in conflict with?

MR. EUBANKS: No, Your Honor. In the North Carolina Supreme Court case, the court simply ruled in that decision that this matter is pre-empted by Federal law. And that was the basis of their decision. The Court of Appeals had ruled, specifically, in citing Hanna and other decisions that it had not been pre-empted, and the Supreme Court, of course, ruled the reverse.

Now, I submit to the Court that Hanna Mining simply says, here is a State court trying to enjoin conduct being engaged in by some supervisors, which the National Labor Relations Act says cannot be done. The employee is not required

to countenance this kind of conduct, and therefore when the State court attempted to enjoin it, this Court said that's okay, you can enjoin that kind of conduct because it does not, in that kind of application of State law, first trade on national labor policy.

Well, we are asking the Court in this instance simply to rule if Congress meant anything when it put the first part of the sentence of 14(a) in there, "Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization," to treat the first half of that sentence the same way, meaning, in effect, if people have a right to belong to a union, as Congress has said, then how can the provision for damages in a State court which only comes into play if these people are not allowed to exercise that right, first trade on national labor policy?

Q But here you don't have the right to work, you have the right to organize. Is that right?

MR. EUBANKS: Yes, sir.

Did the supervisors have a right to organize?

Q The point involved in this case is whether these supervisors had the right to organize.

MR. EUBANKS: No, sir.

Q What were they fired for?

MR. EUBANKS: For simply signing the union card.

Q Is that organization?

MR. EUBANKS: Yes, sir. That's all the complaint alleges.

Q Is that what the Labor Act is set up to control? Organizing of labor?

MR. EUBANKS: Yes, sir, but I submit to the Court that organization includes much more than just joining a union. There are many situations in actual life where frequently people are members of a union --

Q All I am talking about is you keep saying that this is the right to work, that the North Carolina statute is interested in protecting the right to work.

MR. EUBANKS: Yes, sir.

Q And the right to work is not involved, I submit, in this case. It is the right to organize that is involved. Am I right?

MR. EUBANKS: I respectfully disagree with you, Your Honor, for this reason. If I might explain, the reason I disagree with you is this. I think that 14(a), the second phrase of 14(a) covers organizing, yes, but I think it also permits the joining of a union by one individual or more individuals, for that matter, so long as there is no effort on their part to go through the processes of the National Labor Relations Act, calling for recognition, or through some action like was done in the Hanna case.

Q But you did go to the NLRB --

MR. EUBANKS: We were specifically told by NLRB --

Q But you did go.

MR. EUBANKS: Yes, sir. We filed charges.

Q And you filed charges that they had interfered with the right to organize?

MR. EUBANKS: No, sir. We filed charges alleging a violation of Section 881, in that these discharges were a Talladega Cotton Mill situation, dealing with the firing of supervisors to coerce the employees covered by the Act into not participating in the union.

Q That's right.

MR. EUBANKS: That was my theory to the NLRB.

Q Participating in the union -- and the NLRB said no.

MR. EUBANKS: From discouraging employees, Your Honor, as opposed to anybody else. You remember the Act covers only employees.

Q I throught the NLRB said that we don't have any jurisdiction because supervisory employees are not under our jurisdiction.

MR. EUBANKS: They clearly said that, and that was the decision of the General Counsel, Mr. Nash, when he contacted me and Mr. Stockton for the company. The wording of the letter was --

Q Now you go to the State court on the right to work.

MR. EUBANKS: Yes, sir. The situation is one where -- is simply that anybody who has filed a brief in this case, except us, seems to put union activity or organizing and the signing of a union card or joining a union into the same boat. It isn't.

I submit to the Court it isn't the same thing.

Q You have to establish, don't you, Mr. Eubanks, that the North Carolina law is not a law relating to collective bargaining, under 14(a). And your contention is that since all it talks about is membership in a union, it doesn't require an employer to do anything once the man is in the union. It is not a law relating to collective bargaining?

MR. EUBANKS: We submit, if it were, Your Honor, it would be pre-empted. We agree with your position, but we certainly say if it were one relating to collective bargaining it would certainly be pre-empted because 14(a), in the second half of that sentence, says you can't require an employee to regognize that kind of situation, and we agree with that. And we -- all the cases relied on by North Carolina Supreme Court in holding against us, or in reversing the Court of Appeals, we agree with. We agree with Hanna Mining. We agree with any of the cases which spell out the pre-emption doctrine and what is precluded from State jurisdiction and what is allowable.

You will recall in Hanna that this Court said, in Hanna, that that State court, since it is enjoining in conduct

that 14(a) says that supervisors can't engage in, therefore, it is not first rate State law -- I mean Federal labor legislation --

Q The net result of the State court's ruling is that under the Federal Labor Law, under the Federal Labor Statute, the employer has a guaranteed right that can't be interfered with by the State, a guaranteed right to fire a supervisor for union membership.

MR. EUBANKS: Well, that's what the court's position was, Your Honor, but even --

Q But that's necessarily where the State court ended up.

MR. EUBANKS: It is.

Q And that although the Federal Act says that nothing herein shall be taken to prevent membership, nevertheless, there is a guaranteed right to follow if you are a member. That's how the State puts it.

MR. EUBANKS: Well, Your Honor, that's what the State court, as I understood it, said, and that's what I so vehemently disagree with because even, if you recall, I mentioned a case called Tallabega Cotton Mills which, I believe, -- and it involved one of these situations where a supervisor was fired because he was told to go out and engage in some unlawful conduct on the part of his employer and he said, "I am not going to do it," and the employer said, "Well, if you don't do it, I'm going to fire you," and he wouldn't do it so he got fired.

and the case went up through the Board and it was ended up to the situation that the Board ruled and was supported by enforcement that that really coerced employees who were covered by the Act and by firing a supervisor who was being -- in an effort to coerce employees, we feel that situation is covered by 881 of the Act. And I agree fully.

So if the employee sits and contends to this Court and to us and through all the courts that have gone on before that, look, an employee should have absolute right to fire a supervisor. And that's what I want to address this remark to.

Now, I remember in the North Carolina Supreme Court one of the justices asked me the question, look, this means that anybody can be a union member. This even means that a manager could be a union member.

Well, I submit to the Court they can be, and it doesn't mean a disloyalty. Somebody -- it's not -- it's so common in our everyday life that people who go up through the ranks of the union, a local union somewhere in the south, or wherever it might be, can accumulate benefits through membership and he's promoted into supervision. He keeps his membership. The ruling of this Court that people are fired simply because they are union members, not for participation in any conduct disloyal to an employer, but simply by being something, by belonging to something, would, in effect, mean that the employer could go out and fire anybody that was a member of a union.

That's what it means.

In a teacher situation where these teachers attempted to organize in the North Carolina area, for example, this came up as to whether or not they had the right to organize. And, under the First Amendment, of course, if the State said no or the county, as the case might be, it would be protected under the First Amendment.

But, I point out to the Court, respectfully, that to be a union member is not what 14(a) is to protect against, and there is no way it could frustrate Federal labor policy for an employee or a person who has got a right to work and as a part of his right to live go take a job or sign a union card and then end up getting fired, when the Federal Labor Law has already said -- by Congress said -- that we could do it.

Q But your example of the ordinary employee is the easy case because there the Federal law protects that right and, obviously, it wouldn't get this far if it were that kind of a situation. The thing that makes your problem difficult is the man who is a supervisor, and so you do have to address this proviso in 14(a) which doesn't affect ordinary employees.

MR. EUBANKS: That's correct, Your Honor.

One thing I point out to the Court -- the Court had a case that it might find interesting as it relates to this situation. It is a case called U.S. v. Robey. I am sure the Court is familiar with it. It dealt with the question of a

Communist who had applied for a job with the Defense Department, and the Defense Department had a regulation or some policy, or for some reason he was not hired on the ground that his interests were inimical to that of this country, because he was an admitted Communist.

Well, there the Court pointed out, and I'd like to quote that, if I might, to the Court. The Court said this, that "The operative fact upon which the job disability depends is the exercise of an individual's right of association, which is protected by the provisions of the First Amendment," unquote.

Now, I point that out for this reason: I submit to the Court that if Congress did not mean,in its enactment of 14(a), that people should be entitled, even if they are a supervisor, to continue to be able to join a union, and it didn't have that right, surely Congress, in the status of the law in 1947, would have been more explicit in the provisions of 14(a). They don't talk about membership only in 14(a). They talk about membership and then they talk about collective bargaining.

I submit when they talked about membership it said, in effect, that supervisors can join, but I further submit if the supervisors are bound to get and force an employee to recognize them, that's against the law, and 14(a) doesn't protect.

But, unless a supervisor is disloyal to his employer

and the employer learns of that disloyalty in more respect than just his joining an organization, he is certainly entitled to some protection in the State court.

Q The supervisor here joined the collective bargaining agent here?

MR. EUBANKS: Your Honor, this situation came up right after the campaign started. There was no organizing.

Q Well, let's assume that the supervisor decides he wants to join the union who is the collective bargaining agent.

MR. EUBANKS: Yes, sir.

Q I take it that this 164 doesn't relieve the employer from bargaining with the bargaining agent just because the bargaining agent has some supervisor members?

MR. EUBANKS: I respectfully disagree with that. I think it automatically does.

Q All right. Is that settled?

MR. EUBANKS: Yes, sir.

Q So that if the employer -- if the supervisor joins the wrong union, and if he joins the bargaining agent --

MR. EUBANKS: Yes, sir.

Q -- the employer is excused from bargaining with that bargaining agent. Is that true?

MR. EUBANKS: At that point, in my judgment, you could take the position if that union contained supervisors working for me I am not going to bargain.

Q I would think that if it were the other way there might be a better argument for firing him.

MR. EUBANKS: I think so, too, Your Honor, and I would agree.

Gentlemen, I thank you very much. I appreciate the time.

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

Mr. Stockton.

ORAL ARGUMENT OF RALPH M. STOCKTON, JR., ESQ.

FOR THE RESPONDENTS

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

This case came through the entire court procedures of North Carolina, from the Trial Court to the North Carolina Appellate Court to the Supereme Court of North Carolina, and thence on Certiorari here.

The Supereme Court of North Carolina, in a rather exhaustive opinion, reversed the Court of Appeals of North Carolina which had simply recited the Hanna Mining case, and said that on the basis of Hanna the State Court was not pre-empted and reversed the Trial Court. The Supreme Court reversed the North Carolina Court of Appeals and held -- it reviewed the legislative intent carefully of the Taft-Hartley Amendments of 1947, and the statute 14(a) -- and, incidentally, Mr. Eubanks says nothing about 14(b) which requires an agreement and I assume

-- we submit that has nothing to do with this case. There is no union security agreement in this case.

The North Carolina Supreme Court referred to Section 14(a), to the fact that in the 1947 Taft-Hartley Amendments Congress specifically removed supervisors from the definition of employees, and from the general jurisdiction of the NLRB.

Q I thought Hanna was 7 or 8. Are you sure it is 14? Hanna Manufacturing Company -- Hanna Mining?

MR. STOCKTON: I didn't understand your question, Your Honor. Was it in reference to the citation of Hanna Mining?

Q No. Does it involve Section 7 and 8?

MR. STOCKTON: It involves Sections 7 and 8 and the fact that in Hanna this Court said that this was a supervisory union, supervisors' union in Hanna. The Court -- this Court said, in that case, they are supervisors so they are outside 7 and 8. We'll also go further and look to see whether there is any other Federal labor policy that would pre-empt the State Court from acting.

And we say -- this Court says in Hanna the Committee Reports reveal that Congress' propelling intention was to relieve employers from any compulsion under the Act, and under State law, to countenance or bargain with any union of supervisory employees.

So, that, this Court said on 7 and 8 it is out, they are supervisors. Insofar as the overriding Federal labor policy,

what the State Court did in enjoining the supervisors' union from their picketing, was in accord with Congressional intent under the National Labor Relations Act, as indicated by the Committee Reports.

And, therefore, this Court said we will not pre-empt. But that's where our Court of Appeals got off the track on Hanna, because the instant case --

Q Getting back to the other question, what did the Supreme Court say pre-empted what part of the National Labor Relations Act?

MR. STOCKTON: The Supreme Court of North Carolina, Your Honor?

Q Yes, sir.

MR. STOCKTON: They referred to Section 211, the definition,of taking supervisors out of the definition of employees, Section 14(a), and the legislative history and the Federal court cases, Circuit Court cases.

Q What in the Act, any Federal act, says that a State is prohibited from taking action against a supervisor?

MR. STOCKTON: Section 14 --

Q I am wrong. Of the State taking action against an employer at the behest of a supervisor.

MR. STOCKTON: What says that the State --

Q -- is prohibited from giving relief to a supervisor.

MR. STOCKTON: To a supervisor?

Q Yes. Against an employer.

MR. STOCKTON: They refer to Section 14(a) --

Q Which says?

MR. STOCKTON: -- which says nothing prohibits the supervisor, nothing in this Act, the 47th Amendment, prohibits the supervisor from becoming or remaining a member of the labor organization, but --

Q That's all it says.

MR. STOCKTON: No, sir. It says, "but no employer subject to this subchapter which we are, shall be compelled to deem individuals defined herein as supervisors" -- or these plaintiffs in these civil damage State suits -- "as employees for the purpose of any law, either national or local, relating to collective bargaining."

And this State court action --

Q That's related to collective bargaining.

MR. STOCKTON: Yes, Your Honor, but this is --

Q And is there anything in this action in the State court that says anything about collective bargaining?

MR. STOCKTON: In the State statute, itself?

Q No, sir, I said in the action.

MR. STOCKTON: In the action of the State --

Q By the supervisor.

MR. STOCKTON: There is nothing in the complaint that says we are relating this to collective bargaining, but as a

practical matter, it has to relate to collective bargaining, because under -- for example, the legislative history of the 47 amendments is very clear. They are in the brief.

Q Suppose these supervisors are no longer members of the union. Can they bring the action?

MR. STOCKTON: At this time?

Q Yes, sir.

MR. STOCKTON: They are no longer members of the union when they start the suit; is that your question, Your Honor? No, I would say not, Your Honor, because at the time they were supervisors for the defendant. They then joined the union.

Now, the legislative history is clear, if it please the Court, on this matter. Senator Taft, in speaking to these amendments, said, specifically, speaking of supervisors, and this is in the brief, they are subject to discharge for union activity and they are generally restored to the basis which they enjoyed before passage of the Wagner Act.

Q Of course, union activity isn't all that clear, is it, that it would extend to the mere joining of a union?

MR. STOCKTON: Well, if they join a union in the process of a union election going on, then we would say this is certainly union activity. They are joining sides with the union. They are supervisory. They are managers, actually, in these markets.

Q Do you say that the North Carolina law here that prevents a man from being fired for either joining or not joining a union is a law relating to collective bargaining under 14(a)?

MR. STOCKTON: Yes, sir. I think it has to, and --

Q All they said they were doing was joining the union. They weren't making any demand, as I understand it, that the employer bargain with them.

MR. STOCKTON: No, sir, but when they join the union they are, of necessity, affecting the employer's collective bargaining rights. He is dealing with a union which has his supervisors in it, who may be either trying to override the rank and file membership in his favor, or undermine him in the employee's favor, contrary to the legislative intent which has been specifically set out backing up these 47 amendments to provide a balance between employer and employee.

Q Do you think the National Labor Relations Board counts the ballot of a supervisor when it comes to an election on the union?

MR. STOCKTON: They ruled him out of the body of the union insofar as --

Q Then, I take it, you are relating their acts -- these supervisors' acts -- to union activity -- are narrowed down to the proposition that when the foreman, or other supervisor, joins the union, he may be giving aid and comfort to the union and

indicating an employer attitude in favor of the union, as far as the other employees are concerned.

MR. STOCKTON: That's one possibility. But there are other possibilities. For example, this legislative history says that no one, whether employer or employee, needs to have as his agent one who is obligated to the other side. This legislative history makes it clear that the conflict is recognized by Congress in enacting -- in taking supervisors out of the National Labor Relations Act -- in enacting 14(a), and that it relates to the day to day activities and the possibility of domination of the union by the supervisor and member of the union. And says, specifically, evidence before the committee shows clearly that unionizing supervisors, under the Labor Act, is inconsistent with the purpose of the Act.

Q What would be the posture of a foreman, these particular men, supervisors, if a strike were called? What would be their obligations with respect to the picket line? Most unions have a penalty for a member who crosses a picket line. Would these supervisors be subject to that?

MR. STOCKTON: I don't know the answer, Your Honor, but I think the question reveals the problems that -- and the fact that we are, actually, dealing with questions of collective bargaining when you give a State court a right to give a remedy and State court damages in this type of situation.

I might make this point. If the State right-to-work

law is not pre-empted, as to these supervisors, then, insofar as Interstate commerce employers -- employers within the scope of the Act -- the only people protected would be the supervisors. The employees are obviously out. They are within the National Labor Relations Act.

Q I notice that Mr. Eubanks' brief, at page 3, has a short paragraph, third from the bottom. "The union began an organizing campaign at defendant's Winston-Salem, North Carolina, stores in the spring of 1971. In the course of that organizing campaign, the three petitioners named herein signed a membership application to join the union and were accepted into membership in April and May of 1971. There is no evidence that they actively engaged in any pro-union activity."

Do you accept that as an accurate statement of facts?

MR. STOCKTON: Well, if Your Honor please, the case is here. This statement made by Mr. Eubanks is a statement he makes. The case is here, actually --

Q No. I am asking you if that accurately states --

MR. STOCKTON: I don't accept that as the actual facts. I say to the --

Q Did they engage in any other pro-union activity?

MR. STOCKTON: Yes, sir. In my judgment, they did. It is not really in the record before this Court because it comes on before this Court on the pleadings and affidavit, so that --

Q Let's assume that the -- well, perhaps I should put it to you this way: Is it your position that standing alone, the fact that during an organizing campaign they signed a membership application to join and were accepted into membership, is it your position that standing alone, that brings you within the proviso of 14(a) as employees for the purpose of any law relating to collective bargaining?

MR. STOCKTON: Well, if Your Honor please, I would hate to restrict it that closely, but I think --

Q I know. I ask you whether standing alone you would take that position?

MR. STOCKTON: I would take that position, and I think that's what the Supreme Court of North Carolina has said, because of the overriding legislative intent to discourage unionization of supervisors, clearly evidenced at the time of the enactment of the 1947 amendments.

Q I asked Mr. Eubanks about whether or not an employer could be or would be, under the law, under the National Labor Relations Act, compelled to bargain with a bargaining agent who had supervisors as members? Now, let's assume that this union won the election, as it did, and then, other things being equal, it would be the bargaining agent. But, now, the employer says I will refuse to bargain with you because you have some of my supervisors as members. Now, is the employer excused for that reason?

MR. STOCKTON: I am very much afraid the employer might have to bargain with that union. I don't know the answer, Your Honor.

Q Well, don't you think that the answer to that question bears somewhat on the issue in this case as to whether he has a right to fire or not?

MR. STOCKTON: It may, and it, again, indicates the fact that State court action here is becoming intermeddled in a field which should be pre-empted by the Federal courts.

Q Would you be making this argument if the supervisors had joined a union of their own and never asked for any bargaining rights?

MR. STOCKTON: And they were fired?

Q Yes.

MR. STOCKTON: Yes, sir, Your Honor, because --

Q For the same reasons, or not?

MR. STOCKTON: Well, possibly for other reasons. I think there is more conflict where they join the rank and file.

Q Would you say the proviso of 14(a) gives you any comfort in that respect, because the supervisors say we have no interest in bargaining, we don't want to bargain with you at all, we are sort of a lodge.

MR. STOCKTON: I think 14(a) would be more of a problem in that situation, but here they are joined in the rank and file union belonged to by the other employees of the same

employer.

Q Who are, and the union itself is a -- in the business of collective bargaining.

MR. STOCKTON: That's correct.

Q Do you say, Mr. Stockton, that when these three supervisors went to the union and asked the union to file a complaint with the Labor Board for this conduct, that that was engaging in union activity, to ask the union to represent them?

MR. STOCKTON: I hadn't thought of that, Your Honor. I suppose that could be argued. They did go to the union. The union filed a complaint for them. They are -- it is union activity in a common sense respect, I think, if Your Honor please, without any question, and I think we could take that position.

Q On this record, do you have anything other than the fact that they joined? You don't have anything other than that, do you?

MR. STOCKTON: No, sir. On the record --

Q Well, that's all we have before us --

MR. STOCKTON: That is correct. The case came on a motion on the pleadings, and the record is the allegation that they were fired because they joined the union, which we move to dismiss as not stating a claim upon which relief could be granted.

Q They could have resigned from the union the next day

so far as we know.

MR. STOCKTON: Well, that's the record insofar as the case is before this Court, if Your Honor please, and in the procedural manner in which it came here it was the only way it could be, actually.

Q That's right.

Q I am not sure I got fully your response to the posture of the business -- the supervisors in the case of a strike. What about the picket line? If they crossed it, they would be fired from the union, probably, wouldn't they?

MR. STOCKTON: If they crossed the picket line, yes, sir, Your Honor.

Q And they might be subject to penalties from the union, if the union provided for those penalties as they generally do.

MR. STOCKTON: That's correct, Your Honor.

Q You say that's a conflict with the employer's interest to have a supervisor who is in that position?

MR. STOCKTON: That's correct, Your Honor. And the Congress, throughout the hearings on these statutes, referred to the conflict, the right to have a loyal supervisor, the possible conflict on the other side of the domination of the supervisor over the rank and file in a mixed union. And, the situation here would be --

Q Fourteen (a), the first part of it says, "Nothing herein shall prohibit any individual employed as a supervisor

from becoming or remaining a member of a labor organization."

So that bridge has been crossed by Congress, this conflict business about belonging to a labor organization.

MR. STOCKTON: If Your Honor please, the other part is most important and the reports of the hearings make it very clear that the supervisors do not need to be treated as employees --

Q Don't have to be bargained with.

MR. STOCKTON: That's right, but that they don't have, any longer, the right to join a union which is protected by the National Labor Relations Act. They are out of the Act. They are restored to their rights before the Wagner Act accorded-- as to what Senator Taft said.

Q How can you say that, in view of the first section of 14(a), which says, "Nothing herein shall prohibit any individual employed as supervisor from becoming or remaining a member of a labor organization"?

MR. STOCKTON: The legislative history says it, Your Honor, and some of the cases say it.

Q If there is a conflict between the language of the statute and the legislative history, which do you take?

MR. STOCKTON: Here is the point. There is nothing to keep -- and it said in here in some of the cases, too, -- not from this Court but from the Federal Court -- nothing keeps a supervisor from joining the union, but in the interest of the

balance of power in maintaining a loyal supervisory personnel, nothing keeps the employer from firing him for union activity, or for joining a union, I would say.

Q And then you say he can be fired simply for joining a union.

MR. STOCKTON: I think we have to say it on this case, on the record --

Q Well, that really means, according to you, that the labor law, the Federal statute, guarantees to the employer the right to fire any supervisor who joins a union.

MR. STOCKTON: Well --

Q Now, that's pretty hard to take, isn't it, in view of the first sentence of 14(a) that says, "Nothing herein shall interfere with the right of a supervisor to join," --

MR. STOCKTON: No, sir, I don't think it is, taken in context with the entire statement, and taken in context with -- that is the entire statement in 14(a), that the supervisor does not have to treat him as an employee under the Act. He's got a right to join the union, but the employer, on the other side, has the right to treat him not as an employee, at all. He doesn't have the protection of the Act --

Q I understand that.

MR. STOCKTON: -- not to be fired without -- fired for union activity or joining a union.

Q Well, that may be so, but what you are saying is that

the Federal law also prevents the State from giving the supervisor some protection, and in order to do that, you have to say that the labor law guarantees the employer the right to fire.

MR. STOCKTON: I would not go that far.

Q Well, then, how do you pre-empt State law?

MR. STOCKTON: Well, you pre-empt State law simply because the -- of the conflict created between the State and the Federal.

Q There is no conflict unless Federal law guarantees the right to fire. The State says, you don't have the right to fire, if you fire, you are going to be sued for -- you may be sued for damages.

MR. STOCKTON: The Federal says, though, you don't have to treat him -- supervisory employee -- as an employee.

Q Put it in any words you want to, you are saying the Federal statute guarantees the employer the right to fire, as against any contrary provision of the State?

MR. STOCKTON: No, sir, I am saying the State law is pre-empted in this particular field, and that to create a right of action, civil damage right of action, would create all the problems that Congress has talked about in the legislative history, and that I say the latter part of 14(a) is in there to provide against. For example, in this particular case, the employer would be subject to the Federal law as to employees,

the State law as to supervisors. The supervisors would be subject to State law, and the employees would be subject to Federal law. So that you would have the resulting absolute conflict between Federal and State law in situations in which Congress has indicated and this Court has indicated there should be some uniform approach, a Federal labor policy. And we say that under the previous cases, Hanna Mining is the opposite of this case. And I think I got into that for a moment.

Hanna Mining threw our Court of Appeals off because they took the position that supervisors were involved, so Hanna Mining says no pre-emption of the State, so that's what we hold. Hanna Mining did not hold that, as I attempted to explain a few minutes ago.

Our position is, if it please the Court, that under the Federal statutes, under the underlying purpose of a uniform approach, Federal labor policy, under the cases on pre-emption of this Court, that the Supreme Court of North Carolina is correct, and that the State is pre-empted from applying this particular statute as to supervisors in a State court damage action.

MR. CHIEF JUSTICE BURGER: Thank you.

Mr. Eubanks, do you have anything further?

Let me begin by putting a question to you. Suppose the supervisors at the time the organization activity began went around to the employees with cards, asking employees to sign.

REBUTTAL ORAL ARGUMENT OF LARRY L. EUBANKS, ESQ.,

ON BEHALF OF PETITIONERS

MR. EUBANKS: I think they are engaging in union activity and that would be insubordination in the interest of the employer and they could be terminated.

Q Let's take it one step removed. Suppose the supervisors just go around with the union business agent and stand there and say nothing while they are soliciting?

MR. EUBANKS: Your Honor, I think that would be a closer question, but I still think they would be giving comfort to the enemy to some extent. And I think the employer is entitled to believe that his supervision would not participate in such conduct, but the employer owes an obligation, if I may continue and explain this answer, owes an obligation to his -- what they sometimes later learn to be supervisors, to explain to these supervisors that, look,if you want a union campaign, you are our supervisor. You see, in this particular case, you have to remember that these three individuals, they just walked up by some guy and he said here, sign this card, and they said okay and signed it, and they have a hearing on the election petition and they are found to be supervisors and that's all the evidence. No evidence of anything else. They don't vote in the election and the day after the election, they get fired.

Q I take it that you concede that any activity which could be regarded as aiding and assisting the union campaign

would be grounds for dismissal.

MR. EUBANKS: Your Honor, I think that counts in an appropriate factual context, I agree, but I do believe that a person in a supervisory position is not any more entitled or any less entitled to look after his own interests than people getting paid by the hour. I don't see the distinction.

Q The remedy there is to join a union of supervisors, isn't it?

MR. EUBANKS: No, sir, because you have to remember -- not necessarily. You see, the factual context in which this always comes up would generally be where the employee is promoted up into a supervisory capacity. And being a member as an employee would accumulate certain retirement program benefits, and that sort of thing, and if he cancels his membership in a year then he is going to lose his retirement program, or whatever it might be.

Q Well, that's not our case -- point here, is it?

MR. EUBANKS: No, but the reason I am making this point to the Court is that if, at that point, he's got to quit or be fired, leave the union or be fired, he's put in a situation of having to give up.

Q Well, don't we have an unresolved, possibly, an unresolved factual question here, namely, whether the conduct of these supervisors, in whatever they may have done, signing the card, talking to people, whatever, whether that constituted

aiding and assisting the union's organization campaign?

MR. EUBANKS: Now, I pray the Court to read exactly that. Your Honor, I think that that's the whole point the Superior Court missed and the Supreme Court missed. We want an opportunity to try the case on its merits. If it is proven before a jury and before a court that these three plaintiffs did, in fact, sponsor the union, went out and got people to sign for it, traveled around with the union organizer, or did any of those things, that he and any rational man knows is not in the best interest of the employer, provided he knows he is a supervisor, then I think that he's got grounds to fire a man because the man should owe the employer some loyalty.

But, in the status of this case right now, you've got a situation where three individuals, all they did was sign a card, and I think people have a right to do that sort of thing.

I submit to the Court that the Constitution and the law and just common sense give us the right to do that.

Q Mr. Eubanks, suppose the vice president in charge of personnel joined the union to which the majority of his employees also belonged, and which was the collective bargaining agent for the company, but also assume that this vice president said, of course, I am not going to take any part in negotiating with the union. Under your submission, would the company be entitled to discharge him?

MR. EUBANKS: Yes, sir.

Q Why?

MR. EUBANKS: I believe the employee would be entitled, at that point, to refuse to bargain with the union, so long as they kept that individual a member of the union which represented rank and file. I have no problem with that.

Q I assume that he took no part in the bargaining. He said, "I'm not going to have anything to do with that. My duties relate to the personnel for this plant. Somebody else can bargain."

MR. EUBANKS: I have no doubt that the employee would have every right, at that point, to refuse to bargain with the union, and I think that's exactly what 14(a) says.

Q Suppose he were the executive vice president? Nothing to do with personnel.

MR. EUBANKS: I don't believe it would matter, Your Honor, if he were president, except subject to the -- making the last decision in the company.

Q Wait a minute. I don't understand you. The executive vice president could not be discharged if he belonged to the union?

MR. EUBANKS: No, Your Honor. I don't contend -- as I understood the question, that that was what could the -- what right did the company have at that point? I think the company could say, look, to the supervisor, as the case might be, I believe that your interest in belonging to the union of

the rank and file gives me grounds to not recognize this union and bargain with it for my rank and file. And I think 14(a) clearly says that. Insofar as the right of being discharged -- if the evidence is that all he did was join, Your Honor, I submit to this Court that they would have to say to him more or prove more than the fact that he just did like these three men did, sign the card. I believe it takes more than that, because I believe people have a right to do that.

Q You don't think the North Carolina statute applies the biblical injunction against serving two masters?

MR. EUBANKS: Your Honor, I certainly do not. I certainly submit to this Court, and to you, Your Honor, that there is hardly an organizational situation where there is organized labor in the State I'm from, North Carolina, or in any other State, in which supervisors are not members of a union, one or more of them, in any size company. Not necessarily to get bargaining rights, or anything like that, because they came up through the ranks. Yes, sir, I don't agree that being a member of a union is inimical to being loyal to my employer. I don't believe it.

I thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 1:50 o'clock p.m., the case in the above-entitled matter was submitted.)