In the

Supreme Court of the United States

LODGE 76, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, ET AL.,

Petitioners,

v.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION, ET AL.,

Respondents

No. 75-185

Washington, D.C.

Pages 1 thru 41

March 22, 1976

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v.	:	No. 75-185
WISCONSIN EMPLOYMENT RELATIONS COMMISSION, ET AL., Respondents.	:	

Washington, D. C.,

Monday, March 22, 1976.

The above-entitled matter came on for argument at 11:08 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
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
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

GERRY M. MILLER, ESQ., 211 West Wisconsin Avenue, Milwaukee, Wisconsin 53203; on behalf of Petitioners.

JAMES C. MALLATT, ESQ., 250 East Wisconsin Avenue, Milwaukee, Wisconsin 53202; on behalf of Respondents.

NORTON J. COME, ESQ., Department Associate General Counsel, National Labor Relations Board, Washington, D. C.; amicus curiae.

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 75-185, International Association of Machinists v. Wisconsin Employment Relations Commission.

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

ORAL ARGUMENT OF GERRY M. MILLER, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. MILLER: Thank you, Mr. Chief Justice, and may it please the Court:

This case is here on petition for certiorari to the Supreme Court of Wisconsin. The question it poses, as we see it, is the following: Whether Wisconsin may, consistent with the supremacy clause of the Federal Constitution, outlaw peaceful concerted refusals to work optional overtime in support of worker collective bargaining demands, a self-help pressure permitted under the balance of power struck by Congress in the federal labor statute.

The question arises on these facts: The company, a machine tool manufacturer within the Federal Labor Board's jurisdiction, terminated its labor agreement with the union in June of 1971. At that time, the parties had reached an impasse on a number of the company's demands for changes in the contract. One of these was insistence, the company's insistence on increasing basic work day and work week from seven and one-half to eight hours a day and 37-1/2 to 40 hours a week, with a

commensurate reduction in overtime pay.

On March 1, 1972, while the parties were still at impasse on this and other issues, the company announced its decision to implement its work schedule demands unilaterally, just as it had previously changed other established working conditions some months before.

At this time, the union responded by holding a meeting on March 7th at which the membership voted to seek strike sanction from the international union and unanimously resolved that no member should work overtime, to find his work over 7-1/2 hours a day or 37-1/2 hours a week. Though the company continued to schedule overtime work thereafter, the membership resolution was observed by virtually all of the over 600 members over the next four months, until the new contract was settled in late July.

Faced with the union's counter to its self-help initiative, the company backed off from implementing its work day and work week demands. The impact of the union's overtime moratorium was to cause severe economic hardship to the company in its effort to deal with temporary pulse increases in production loads, while the workers lost substantial additional earnings that they would have received had the overtime been worked.

For the past 17 years, K & T employees, the company's employees had worked a 7-1/2 hour work day and the 37-1/2 hour work week. They continued to do so throughout the period March through July 1972, in other words during the overtime moratorium.

By custom and understanding, as the Commission found, respondent Commission, none of these employees had been required to work daily or weekend overtime prior to the March 7 membership meeting. Admittedly, since acceptance of overtime assignments remained optional thereafter, no employee who concertedly refused to accept scheduled overtime pursuant to the moratorium was even disciplined.

The union rejected a company proposal to settle the controversy by deferring, by the company's deferring implementation of the new work schedules if they union would agree that all daily overtime would now become part of the regular work schedule and cannot be refused except for reasons acceptable to supervision.

On June 12, 1972, during the overtime moratorium, but the same day that commenced the present action, the company filed a charge with the NLRB alleging in part that the union's overtime moratorium restrained employees in the exercise of their section 7 rights and violated its bargaining duty to the employer under sections 8(b)(1) and (3) of the National Labor Relations Act.

That charge was dismissed by the board's director on the ground that the overtime refusals were not violative of the federal statute. The director cited the 1960 decision of this Court in Insurance Agents International Union where various concerted interferences with production, on the job action were

held permissible under the Act, though assumed not to be protected from employer reprisal by section 7 of the national Act. In this case, in our case, the director made no determination as to whether K & T employees lost that protection by collectively exercising the right to reject overtime work in the circumstances here.

However, the State Commission in the instant proceeding and later the Supreme Court held that the very same peaceful self-help activity permitted by the board's director breached a Wisconsin labor relations statute which prohibits workers from engaging in any concerted effort to interfere with production except by leaving the premises in an orderly manner for the purpose of going on strike.

The union's defense of federal preemption was rejected by the state tribunals on grounds that the conduct was neither arguably protected nor arguably prohibited by the federal statute and, on the authority of this Court's 1947 decision in Briggs-Stratton dealing with state jurisdiction to enjoin quickie strikes within the plenary power of the state to regulate.

That states the case on these facts. We desire to emphasize two of the arguments against state jurisdiction presented in our brief. The first, that Briggs-Stratton is plainly distinguishable from this case; the second, that Briggs-Stratton should be declared overruled or limited to its exact facts, now, of course, the reasons supportive of the latter reinforce the

former.

The first point: Without reaching any issue as to the current survival of any prior decision of this Court, we think state jurisdiction must yield simply because the quality of the conduct here is so different, different in kind from that which has heretofore ever been held subject to state prohibition in collective bargaining.

Please contrast, if you will --

QUESTION: Would your view of the matter be the same, Mr. Miller, if the statute was directed against a typical sit-down that is occupying the premises?

MR. MILLER: No, Mr. Chief Justice, it would not be. I believe --

QUESTION: I am not suggesting a statute that goes to the subject of violence but --

MR. MILLER: I think physical obstruction of a plant creates a series of state interests a fortiori, of course, to trespass, that amount to physical obstruction, the exercise of physical force in occupying the premises. I see nothing comparable to that consideration in terms of state interests here.

Contrast the violence, the property damage, the bombings, the threats and other disorder traditionally subject to state prohibition with the entirely peaceful concerted activity of the workers in this case. Consider the obvious differences between the sit-down strikes of years past and even the more

recent issues of state jurisdiction to enforce trespass laws respecting private property in labor dispute disuations with the entirely authorized and orderly conduct of the workers at K & T's plants here. They didn't occupy the premises. The controversy here arose when the employer wanted them to stay longer than they chose to stay.

Third, compare the conduct in Briggs-Stratton, 26 unauthorized and unannounced mid-shift union meetings, so-called, supporting unstated demands, designed so that management could not predict their occurrence and plan production around them, with the entirely predictable known measured, and we might even say subordinate, concerted activity in this case.

K & T's workers arrived at work at the appointed time each day for four months, performed their work without interruption and with customary productivity for the basic work day and work week. They left work at the end of the established work day and work week, merely exercising collectively their acknowledged right, acknowledged by the employer to reject scheduled overtime work.

QUESTION: What would you say if they had all said they were all going to go home a half hour early?

MR. MILLER: Mr. Justice Stevens, that would present a different situation. In this case, if the employer were to authorize that or condone it or to somehow fail to invoke his discipoinary powers to counter it, I would think that that case

presents a different circumstance than this case does.

QUESTION: What I am searching for, Mr. Miller -- and I am sure you will spell it out before you get through -- is what is the bright line that makes this difference in kind from Briggs-Stratton and trespass -- it is not peacefulness versus violence, I understand --

MR. MILLER: Absolutely not. There are, I believe, two theories here, a broad and a narrow theory, either of which is sufficient to justify reversal in judgment. The narrow theory so-called is to focus on the character of the conduct here and the character of the overtime, the nature of the workers' response and say this is right at the heart of federal concern, the kind of activity for which there is no state interest in substituting state judgment or local judgment for what Congress has done. In fact, what that comes down to saying very closely is this is at the center of the federal concern because this is conduct that is actually protective from employer reprisal by section 7 of Taft-Hartley. The broader theory --

QUESTION: If you go that far, aren't you overruling Briggs-Stratton?

MR. MILLER: No, I don't think Briggs-Stratton -- I think Briggs-Stratton really stands today for a very, very narrow holding, to the extent that it lives at all, and that holding is that in conduct -- that the conduct of the unionin Briggs-Stratton was so crude, so without redeeming interest that it

could be assimilated to the character of violence in a labor dispute or physical takeover of the plant. This Court said as much in the O'Brien case, cited in the AFL-CIO brief. It analogized what it had been saying and doing in Briggs-Stratton with labor dispute violence, physical takeover, physical obstruction, the exercise of physical force in sit-down strike situations. To that extent, perhaps Briggs-Stratton was, but not to any greater extent than that. I don't think anybody can say that the activity in Briggs-Stratton or that the sit-down strike is protected from employer reprisal. I am sure that violence in a labor dispute is not so protected.

QUESTION: But, of course, the dissenters in Briggs-Stratton thought it was protected activity.

MR. MILLER: The dissenters in Briggs-Stratton -- and, of course, that was a very early decision, Mr. Justice Stevens -- were focusing in on section 13 and section 501 of Taft-Hartley as to whether that kind of -- as to whether those statutes pre-empted state prohibition. I think preemption analysis has moved a great deal further along since that time. I think I would have to concede, for example, that an employer's self-help weapon, legal under federal statutes, such as a lock-out, for example, is the very kind of concern at the heart of federal labor policy that a state may not directly prohibit. I don't think the dissenters in Briggs-Stratton were focusing on that kind of an issue at all.

Back to the factual analysis here. Management knew in advance in our case, unlike Briggs-Stratton, precisely what to expect, when to expect it, and the demands that it furthered. The company would have liked to have had the overtime as well, just as the workers would have liked to have the wages payable for it. But the parties were without a collective bargaining agreement, at an impasse in negotiations, and economic pressures appropriate to resolve the stalemate.

In some, as this Court later indicated in O'Brien, the Michigan strike vote case, Briggs-Stratton survives, if at all, only with respect to concerted activities that can be fairly assimilated to physical takeover of the plant, a sit-down strike or labor violence.

QUESTION: Well, what is your legal argument going to be that this is actually protected activity?

MR. MILLER: We make that argument, Mr. Justice White.

QUESTION: Well, what is your first argument?

MR. MILLER: Our narrow argument is that in fact in this case Briggs-Stratton is totally inapposite because their conduct is so close to the center of federal concern as to in fact be protected. The second --

QUESTION: You say it actually is protected activity?

MR. MILLER: Yes, sir, we say that.

QUESTION: That is your first argument?

MR. MILLER: That is the narrow argument.

QUESTION: So that means the Court should reach whether it is actually protected or not --

MR. MILLER: The Court need not reach that issue.

QUESTION: I know, but that argument indicates that you should if you say that is your first argument.

MR. MILLER: Well, the first argument is that because this conduct is so different from Briggs-Stratton that it does not fall within the rule.

QUESTION: Forget Briggs-Stratton for a minute, let us just talk about the federal labor law. What is your first argument?

MR. MILLER: The first argument is, Your Honor, that this -- the broad argument is the first argument, the most important argument, and that is that this is a self-help activity permitted by Congress in Taft-Hartley. It is therefore part of the balance of power that Congress struck when it enacted and amended this basic labor statute and therefore, since it is crucial to the balance of power, it cannot be subject to state preclusion or prohibition.

QUESTION: So you are saying generally state intervention in the area is generally preempted?

MR. MILLER: I think it depends on the area in the area of peaceful economic weaponry --

QUESTION: You think the federal labor policy in this area is no regulation?

MR. MILLER: No, sir, the federal labor policy in this area is free play of economic force. That is a regulation.

QUESTION: I know, but the government shouldn't touch it? The state government shouldn't touch it?

MR. MILLER: Certainly not the state government, Justice White, certainly not the state government, and certainly not for no interest other than to secondly have the federal balance.

QUESTION: Well, let's assume that we disagree with you on that point, what is your next -- is your next argument that it is actually protected?

MR. MILLER: The next argument is, yes, it is actually protected.

QUESTION: And it is not that it is arguably protected?

MR. MILLER: That is correct, arguably protected --

QUESTION: You do not argue the arguably protected point at all, I gather, in your brief?

MR. MILLER: Your Honor, arguably protected, in our view, is simply shorthand for the broader category and the broader theory we are referring to, which is self-help weaponry. What Congress intended to permit, no state can set aside.

QUESTION: As in the Morton case?

MR. MILLER: As in Morton, Justice Stewart, as in Insurance Agents, at least for the clear implications from it, as in Florida Power & Light.

QUESTION: But if we disagree with you on your first point, you then say we must look -- that we should look and see if it is actually protected or not?

MR. MILLER: Your Honor, what I tried to get across with respect to the first point is that because the Labord Board has found to be actually protected --

QUESTION: I understand your first point, or I think I do. What if we disagree with you?

MR. MILLER: You still have to face whether or not Briggs-Stratton, the rule in Briggs-Stratton is sufficient to cover the kind of conduct here, to permit it, to be prohibited by state regulation, and the entire thrust of my first argument as presented here was to try to dispel the notion that on the facts this can be compared at all.

I believe I reserve some more time now.

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

Mr. Come.

ORAL ARGUMENT OF NORTON J. COME, ESQ.,

AMICUS CURIAE

MR. COME: May it please the Court --

QUESTION: Mr. Come, before you get under way, let me ask you this question, a hypothetical variation. Suppose the employees decided that the way to handle this problem was to work four hours a day, five days a week, that would make it probably, I think you would agree, not feasible to bring in another

crew to work the other -- to round out the work week. Do you think that would be protected activity?

MR. COME: I don't think that that would be protected by section 7 of the Act against employer discharge, but it doesn't necessarily follow from the fact that it is not protected by section 7 against employer discharge, that the state, under a labor relations statute, would be empowered to prohibit it. I think that that was the Insurance Agents, because in that case, as the Court may recall, these agents engaged in a series of partial strikes which involved reporting late and leaving on their own time, and the Court, although it was willing to accept the board's concession that that would not be protected by section 7 in the sense that the employer could discharge them, nevertheless found that the board could not, without upsetting the balance of economic weaponry that Congress had left, go further and prohibit it. And I submit that --

QUESTION: Is there any issue about prohibiting the conduct, or is it merely a question of whether it was inconsistent with good-faith bargaining?

MR. COME: In Insurance Agent, the question was whether or not the board could find that that was a violation of the duty to bargain. However, in finding that the board could not through 8(b)(3) outlaw this conduct because of its own feeling that this was more effective than a strike and hurt an employer more than a strike would, the rationale of the Court's

holding is based upon a consideration of the economic weapons that were left in reserve at the bargaining table, and the Court concluded that, although Congress had regulated the use of economic weapons for particular objectives, its failure to specifically prohibit the use of this tactic indicated an intention to leave it to the parties as part of the economic weaponry that they have to back up their bargaining demands. So that although Insurance Agents rested on 8(b)(3), the rationale, we submit, of it goes beyond 8(b)(3).

Now, I would like to just back up a moment and give a little of the historical background here. Briggs-Stratton was decided 27 years ago, when the doctrine of preemption was in its infancy. The Court undertook to decide for itself whether activity was protected by section 7 or prohibited by section 8 of the federal Act, and upon finding that it was neither, it concluded that the intermittent work stoppages there were left to state regulation.

Now, what is wrong with this approach, as the Court has recognized over the years, is that it required the courts and ultimately this Court to decide in each case for itself whether activity was prohibited or protected, and this was a difficult task that Congress entrusted primarily to the board to determine and for which the Court was not too well equipped to handle.

Secondly, it overlooked the fact that Congress may

have designedly left some activity unregulated, the free play of economic forces. Now, Garmon, which came ten years later, was an effort to deal with this problem. It enunciated the test of whether an activity is arguably subject to section 7 or section 8 of the Act, the states as well as the federal courts are ousted of jurisdiction. And since this was inconsitent with Briggs-Stratton, the Court dropped the footnote in which it indicated that the Briggs-Stratton test is no longer of general applicability, application.

QUESTION: That was in the Garmon opinion?

MR. COME: That was in the Garmon opinion. Now, Garmon has been easy for the courts to apply and, in my judgment and experience, it has worked well in minimizing state intrusion into matters that are clearly regulated by the national Act.

QUESTION: There has been some dissatisfaction with it, hasn't there?

MR. COME: Yes, I get into that. However, recently some members of the Court have indicated a disposition to reexamine Garmon because, although there is a ready means of getting the board to determine whether activity is prohibited by section 8, in order to get a board determination of whether it is protected by section 7, the employer has to commit an unfair labor practice and in some cases you may not even have an employer involved.

QUESTION: That is pointed out in the seriatum?

MR. COME: That is correct. However, we believe that you don't have to resolve that issue here. That is a question, that if it is to be reexamined, should be in the case where it makes a difference as to whether or not a finding that the activity is not protected by section 7 against employer discharge would leave it open to state regulation. Now, in the area that we have in this case, where you have the use of a peaceful economic weapon as part of the arsenal of weapons that is used at the bargaining table, I submit that the reasons that I indicated earlier, Insurance Agents makes it plain that that is an area that Congress left to the free play of economic forces.

QUESTION: It is your position that you just don't need to reach the arguably protected or the Garmon --

MR. COME: That is correct, because, no matter how you decide that, it is still preempted, and I think that the Morton case, which came in 1964, indicates that where you are dealing with the type of activity that you have here, where a consequence of finding that it is not protected still leaves it in the field preempted by the Act, the proper analysis really is whether or not it is preempted. And in Morton you have a very similar situation. Instead of using a refusal to work overtime as a bargaining weapon, what happened was that the union appealed to the customers of the company that they were negotiating with for

a voluntary boycott, and a voluntary boycott is not proscribed by a national act, although a course of boycott is, the State of Ohio gave damages for that and this Court found -- upset that damage award, finding that to do so, even though this was not protected against employer discharge by section 7, would upset the balance of power, and similarly here --

QUESTION: That was based on a very specific legislative history that Congress had considered this and rejected it and therefore clearly left this to the area of self-help?

MR. COME: That is correct, Your Honor. However, I submit, as I attempted to point out in answer to Justice Stevens' inquiry, Insurance Agent shows that Congress did focus on the question of collective bargaining.

QUESTION: The Insurance Agents case involved the question of whether or not that slow-down, if that is what it could be called in that case, amounted to a violation of what, 8(b)(5), a refusal to bargain?

MR. COME: 8(b)(3).

QUESTION: 8(b)(3), a refusal to bargain, did it not?

MR. COME: That is correct.

QUESTION: Which is a different question?

MR. COME: It is a --

QUESTION: And it is a discreet question, a separate question.

MR. COME: It is a discreet question, but the route by

which the Court came to that conclusion required an examination of the basic policies of collective bargaining that Congress had embodied in the Act, and it is the rationale of Insurance Agents which we submit covers this case.

QUESTION: Mr. Come, may I ask you, was there a conviction issued in this case or was there just a state finding of an unfair labor practice?

MR. COME: Well, there was a state finding of an unfair labor praftice. The state issued a cease and desist order which --

QUESTION: Could the union have removed the case to the federal court?

MR. COME: I don't know --

QUESTION: Well, I just --

MR. COME: I doubt it, because, as I understand removal, you have to have concurrent jurisdiction in the federal court, and if you are going to turn around and argue that the case should be dismissed on the grounds that it is preempted, you don't have jurisdiction. Usually that is why, when we have a preemption problem, if we don't appear in the state --

QUESTION: But if it had been removed under the issue of the question of injunction or not under the Norris-LaGuardia it would have been --

MR. COME: Unless the Wisconsin statute --

QUESTION: This was under the Wisconsin law, wasn't it?

MR. COME: This was under the Wisconsin law, yes, Your Honor.

QUESTION: If I understand your argument, it is a little broader than Mr. Miller's. Do you take the position that all non-violent collective activity in connection with collective bargaining is preempted?

MR. COME: I think that basically that is --

QUESTION: That would include a sit-down strike?

MR. COME: A sit-down strike, I would say by practice has gotten into the same category as violence.

QUESTION: I see. But if you get it out of that extreme form of conduct, it --

MR. COME: The example that you gave me of going home early --

QUESTION: That would be preempted?

MR. COME: -- that would be preempted. Now, I am not saying that that would be protected against employer discharge.

QUESTION: I understand. I understand.

MR. COME: Yes, sir.

QUESTION: Well, what if the dispute were an obstacle dispute?

MR. COME: Well, there you get into a problem of whether 301 would give a separate set of remedies. I think that the question of preemption under the National Labor Relations Act --

QUESTION: But this was collective bargaining for a new contract, wasn't it?

MR. COME: This was. The contract had expired.

QUESTION: Okay.

MR. CHIEF JUSTICE BURGER: Mr. Mallatt.

ORAL ARGUMENT OF JAMES C. MALLATT, ESQ.,

ON BEHALF OF THE RESPONDENTS

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

We respectfully submit to this Court that we are walking in to the new no law, no man's area. The State of Wisconsin afforded a remedy against coercive harassing tactics in a plant. I am not going to waste this Court's time with argument as to whether or not the overtime here was voluntary or required. We take the position that the record would support the argument that it was required. But I mention this point to demonstrate the absolute necessity for hearings in these types of cases. We urge this Court strongly to adopt the views of Justice White in Lockridge, Ariadne and Nash-Finch. We ask this Court to use this case, and there must be a reason we are here. We ask this Court to use this case to limit Garmon to preamption only where activity is actually protected; prohibited activity, there is a forum, the National Labor Relations Board; arguably protected activity, there is no law, it is a no man's area, and we are going to do the same thing we did in Guss v. Utah Labor Board,

which Congress for once acted quickly and changed and filled the no law, no man's area.

QUESTION: This isn't really responsive to your friend's arguments that, as a general matter, there is pre-emption here in Insurance Agents sense.

MR. MALLATT: Insurance Agents, in my judgment, has no play in this case because what this Court held in Insurance Agents was that this type activity is not sufficient evidence for the board to find 8(b)(3) that faith bargaining. Now, Insurance Agents held different, that employers would have a forum to at least get a hearing as to whether or not this conduct --

QUESTION: I know, but the argument on the other side is whether, even if this is not protected, and even if it isn't prohibited, the state can't touch it.

MR. MALLATT: I understand that.

QUESTION: Well, what is your response to that?

MR. MALLATT: What we are concerned with --

QUESTION: Beyond that basis, it wouldn't make any difference whether you got access to the board or not.

MR. MALLATT: Well, our position is Briggs-Stratton. Briggs-Stratton clearly covers this.

QUESTION: The argument, as I understand it, and as I understand Justice White's question to be indicating, of your counsel on the other side is, simply whether or not this isn't

arguably or actually protected in the sense of the act nor arguably or actually prohibited, but it is simply something that Congress left to self-help, and for that reason it cannot be touched by the state. Isn't that the argument? Do you understand that to be the argument?

MR. MALLATT: Yes, that is clearly their argument. I disagree with that.

QUESTION: Yes, I understand you disagree with it.

MR. MALLATT: Firmly, this Court looked at the legislative history in this area in much detail in Briggs-Stratton, and I do not --

QUESTION: But that is not a question of limiting Garmon, that is another issue.

MR. MALLATT: I understand --

QUESTION: -- and I think you had better ask the question of the threshold of the case.

MR. MALLATT: Your Honor, I wanted to make that point right away, because I believe, from my reading of the case, that one of the reasons we are here today is this Court is extremely concerned with uniformity in the labor law, but it is also very concerned about affording the people of the United States, including employers, a right to some sort of forum if they have what we feel is a legitimate --

QUESTION: Well, it could be the case might be here because the Court thought the Wisconsin Supreme Court was wrong

on an important question.

MR. MALLATT: That is an absolute possibility, there is no question about that, Your Honor, no question about that. I would hope to try to persuade you otherwise.

I would like to point out to this Court, if I may, some practical problems an employer faces when he is faced with concerted activity in the plant. It is too risky for him to discharge his employees. It is too risky for him to discharge the union stewards. And it is not a practical remedy.

Just last week, we had concerted activity, partial strike activity is what we are talking about here, at the Panama Canal. The ships were backing up. Would it have been an effective remedy of any kind to fire the ship pilots? We couldn't have gotten those ships through the canal. So the self-help remedy is not practical, it puts the employees in the middle, puts them right in the middle between the union, which is telling them on threat of fine, don't work overtime. The employer, on the other hand, is telling them, you've got to work overtime or we are going to discharge you. Who is in the middle? The employee is in the middle.

QUESTION: Mr. Mallatt, I think the question is why is this different than an all-out strike? Don't those arguments equally apply to the strike itself?

MR. MALLATT: Several reasons. On an all-out strike, an employee risks replacement, permanent replacement. Now, this

is very significant --

QUESTION: Doesn't that also happen in a slow-down and discharge, wouldn't the same thing happen?

MR. MALLATT: As I read the law, the employer has the right to discharge the employees because this is unprotected activity. I say that remedy is not practical, it is not effective, and it will create industrial warfare.

QUESTION: Discharge and replace insofar as his legal rights go?

MR. MALLATT: That is my understanding. On the other hand, the union -- other employees have the right to strike in protest to the discharge.

QUESTION: Do you say that if the overtime was wholly optional with the employees?

MR. MALLATT: I believe that the overtime in this case was not optional.

QUESTION: I understand that.

MR. MALLATT: I want to make that clear.

QUESTION: I know. I know. But you started out by saying in this case it doesn't make any difference whether it was required or not. Now, let's assume it was not required, that overtime, as is frequently the case, was optional.

MR. MALLATT: Right.

QUESTION: Now what do you say, can you be fired for saying I will not work overtime?

MR. MALLATT: I say if it is concerted, I also say, Your Honor --

QUESTION: Well, it may have been concerted, but could you then fire him for doing it in a concerted way?

MR. MALLATT: I would say yes under the John Swift case, the board case. I view that case that the employees had the right to voluntarily individually refuse, but not concertedly.

Now, there are other problems, practical problems the employer faces. It is suggested that a lock-out is a proper remedy or defense to this type of activity. We take the position that an employer should not be forced to close his plant to protect himself against activity in the plant. But we also take the position that this raises a very serious problem in a legally questionable area as to whether or not you can replace, permanently replace locked-out employees. We think that --and the employer is faced with another legally unfair area, in our judgment.

Under United States Pipe & Foundry, the board and the D. C. Circuit said an employer may not reduce or withhold benefits once a contract is expired in order to pressure his employees to reach agreement with his bargaining position. An employer may not do that, at least that is what the board says and that is what the D. C. Circuit says.

Yet, on the other hand, I guess today we are considering

-- and according to the petitioners -- the union may use partial strike, in-plant strike tactics to pressure the employer. All we say is if we put pressure on the employees, the union has a remedy, they can file a piece of paper with the United States government, the National Labor Relations Board. But if we pre-empt this area, the employer is going to be left without any legal remedies. He still has self-help and what have you.

We do not believe that Congress intended this. Now, I realize the problems involved with local states and courts, whatever it is, deciding the question of actually protected. I concede there is --

QUESTION: If you made a written rule that overtime is required and people refuse to live up to it, obey it, I suppose you could discharge them and replace them.

MR. MALLATT: That's true.

QUESTION: Did the Wisconsin courts -- was there a finding in the courts on whether it was required or not?

MR. MALLATT: The Wisconsin court took the view that it was not protected, the activity, whether or not it was voluntary.

QUESTION: Whether or not it was voluntary. Now, my question was did they find whether or not it was voluntary or required?

MR. MALLATT: They did not make that finding. The problem was, Your Honor, when the case was first tried before

the Wisconsin Employment Relations Commission, the union took the position that it was preempted on the grounds that the activity was prohibited, so the hearing was conducted on that basis. The voluntary argument was not raised until the State Supreme Court. And I say that this is a perfect example of why there should be some hearings in this type case, because if it is going to turn on whether or not it was voluntary, that cries out for a need of some sort of a hearing, is our position.

QUESTION: I thought you told us earlier -- clarify it, if I misunderstood you -- that if there was a refusal collectively to work overtime, that was not protected --

MR. MALLATT: That is our opinion.

QUESTION: -- but individually it would be protected. Now, in response to Mr. Justice White, I didn't think you made that distinction.

MR. MALLATT: Well, you just made it for me.

QUESTION: Well, do you mean that just one employee says I will not work overtime, he could be fired and replaced?

MR. MALLATT: That is correct. That is correct. Here you have 350-plus who refused to work overtime for four months, except three who worked on one Saturday. I mean, this was a little bit different ball park than Dow Chemical, where you had just a few employees who refused to work one weekend of voluntary overtime, which hadn't even been posted on the posting board before they made their decision not to work. And there

was no union direction or ban or order there.

QUESTION: Is this distinction you are making a practical one, or is it a legal one? Are you saying as a practical matter the employer can't fire 350 people, where he could fire one employee?

MR. MALLATT: No way. No way. One or two he may.

QUESTION: So it is a practical one, not a legal one?

MR. MALLATT: Well, it is a legal argument, Your Honor, because they raised the question, the defense, that this is not -- that this is in fact protected, in their view, because the employee may voluntarily refuse anyway. My argument is in response to that.

QUESTION: When you say it isn't practical to replace several hundred people, it has been known that people have been replaced in hundreds, 200, 300, some of that very close to us here.

MR. MALLATT: It is not practical in Milwaukee, Your Honor.

QUESTION: Well, Milwaukee is a bigger city than Washington, D. C.

MR. MALLATT: We don't believe that Congress intended that the parties engage in warfare. I think Congress intended that there ought to be a hearing to determine whether or not certain activity of this nature is or is not lawful. If it is lawful, I am out of court. There is no question, if this

activity is permitted, I am out of court. What I am asking for is a remedy to make that, find that out. You see what happened here is typical. We filed a charge, the regional director dismisses it, relying on Insurance Agents. It sort of implies that we go to see the state about it.

QUESTION: I am probably, as usual, confused, but if you say the activity overtime is required and that these people were breaking them a work rule and therefore you had the right to fire them --

MR. MALLATT: That's correct.

QUESTION: -- why don't you just discharge them and replace them, like you would in a general strike, rather than trying to seek some general relief against the union?

MR. MALLATT: Because very candidly, if we did that, Your Honor, we would be putting ourselves out of business. To discharge 350 employees, fire them, would create the kind of industrial strife in West Alice, Wisconsin like you have never seen before. We would just have to shut her down.

QUESTION: Well, that may be so. That may be so, and if the union struck generally, I suppose you would have to be shut down, wouldn't you?

MR. MALLATT: That is correct.

QUESTION: Or you could fire a few.

MR. MALLATT: I would like to make this point, if I may: When a company and a union -- and I have been negotiating

labor contracts for twenty years, representing employers -- when a company and a union reach an agreement at the bargaining table, any professional in the union business will tell you that if they can go to the membership and say this is the company's last offer, you accept it, it is fair, or you must strike and lose wages and possibly be replaced, then the employee will accept it, if it is fair. But if we have a middle ground where they don't have to accept, they don't have to strike, but they can do these things in the plant, then I say, as a practical matter, we are opening up a vast area that is going to fill us with all kinds of legal problems. We would hope --

QUESTION: Is there a middle ground on your response? I am not sure you answered Mr. Justice White. Would there be a legal objection to discharge of a handful of employees out of the 350, or would you have to discharge either all or none?

MR. MALLATT: You are asking me questions that I really haven't decided because, you see, all of these unprotected cases come up as an employer is defending himself against an unfair labor practice charge. In those instances, the board decides whether the activity was protected or unprotected, and it becomes a very close factual decision. But the employer is always defending himself. So it may turn on a lot of different factuals, but generally speaking, the Labor Board takes the position that a concerted refusal to work overtime is not protected.

Now, if I had 350 employees involved in it, I would have a problem. Do I fire them all? Am I discriminating in between? Do I fire just the stewards? I have a very serious problem with that. I just as a practical matter wouldn't know how to answer it. I suppose the safest way legally is to fire them all.

QUESTION: Even if you can fire all of them --

MR. MALLATT: Pardon?

QUESTION: Even if you can fire all of them, I suppose you can't subject yourself to a charge of firing on a discriminatory basis, just pick out the --

MR. MALLATT: That's right, it would take some very, very risky decisions, and we say that is not an effective remedy.

QUESTION: I suggest that you fire every tenth employee, making sure that by coincidence not too many of the number ten people were shop stewards or some such thing.

MR. MALLATT: Well, I would face a problem because I know a charge would be issued and I would guess that an examiner, an administrative lave judge would say I discriminated. But even if he didn't, I would probably have a strike on my hands because the others that I didn't fire would walk out in protest.

So these are serious problems, very serious problems for an employer.

QUESTION: Well, if you are really right, that you have the right to discharge here, I don't know why you would

really get in very much trouble in picking and choosing or if you did every tenth or every third, or something like that. The union is stopping short of closing you down completely, and the question would be could you stop short of a total discharge or a total lock-out.

MR. MALLATT: I believe the board would take the position that I was violating section 8 of the Act. I believe the board would take that position. In U.S. Pipe, the employer didn't engage in any kind of firing at all. He said if you guys aren't going to accept my offer and you are going to keep working, then you are not going to get paid holiday pay, you are not going to get paid holiday pay, and I am not going to pay you vacations. Now, that is a rather mild approach. But what happens? The D. C. Circuit tells us we violated section 8(a)(5), we are bargaining in bad faith. But, on the other hand, we hear -- and maybe it is Insurance Agents that caused all the mischief here -- we hear that harassing tactics may be put on us, and we have no remedy except self-help. This is bothersome. It is bothersome out there at the level where we have to negotiate labor contracts.

QUESTION: Would you say that kind of self-help is self-destructive?

MR. MALLATT: Absolutely. It is the worst thing we can do if the purpose of the Act, the central purpose of the Act is to avoid industrial strife. I cannot think of anything that

creates more strife than firing members of a trade union, a political organization. They must do everything they can to get those employees their jobs back, and there is nothing that is more destructive of good-faith collective bargaining than for an employer to start firing the members.

QUESTION: I suppose the counterargument is that if you make the union fish or cut bait in the two extreme alternatives, that they may find they have to strike instead of engaging in some lesser activity like this. Doesn't the argument -- the same argument can be made on the other side of the coin, it seems to me.

MR. MALLATT: Well, the union has two choices: It can accept the company's last proposal or it can strike, or it can continue to negotiate with the company and not make unilateral changes in the plant. You see, the employer can't do that, why should the union be able to do it? The employer can't pressure his employees if they are working after a contract has expired. He may lock them out.

QUESTION: Couldn't you unilaterally adopt a new overtime program?

MR. MALLATT: We never put it in.

QUESTION: But you tried to?

MR. MALLATT: That was a little pressure, but it didn't work.

QUESTION: I see.

MR. CHIEF JUSTICE BURGER: We will resume at this point at 1:00 o'clock.

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

AFTERNOON SESSION - 1:00 O'CLOCK

MR. CHIEF JUSTICE BURGER: Mr. Mallatt, you may continue. You have about seven minutes left.

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

In our view, Briggs-Stratton has served this country well since 1949. There is very little partial strike activity in the industrial scene, in the industrial area. Contrast that to the public area, where in most cases it is unlawful for municipal employees to strike. You find a very common problem of partial strikes, sick-ins, move-through, these things are common.

In the industrial area, and we submit, because of the holding of this Court, that partial strike activity is not legally sanctioned under the National Labor Relations Act. We have had very little of this type of activity.

QUESTION: By your hypothesis, though, that would mean that the other 49 states went along with Wisconsin in making it a state unfair practice?

MR. MALLATT: I am urging this Court to sustain Briggs-Stratton, which I believe has the effect of ruling that these states may regulate partial strike activity.

QUESTION: But it still wouldn't be a solution on any national basis unless the other 49 states did what Wisconsin did.

MR. MALLATT: That is absolutely correct. We are

asking the Court to balance the problem of lack of uniformity against the problem created of no effective avenue to get this kind of issue litigated.

QUESTION: I suppose part of your answer would be that this is a matter up to the states if they want to get the benefit of the kind of law Wisconsin has, they can do what some of the states did with the right-to-work law?

MR. MALIATT: That is correct. As a matter of fact, Colorado and Hawaii copied the Wisconsin law, which has been law since 1939, and I believe that this is only the second or third time that statute has ever been used. We feel that it is appropriate that the state have the right to afford a hearing so that we may get a cease and desist against the perpetrating union which banned the overtime versus requiring us to take action against individual employees.

This Court's concern for an available remedy was, I believe, one of the reasons for its decision in Vaca v. Sipes, activity which was clearly prohibited under the National Labor Relations Act.

I also believe that this Court's concern that some avenue of judicial remedy be available was part of its reason for its decision in Linn v. Plant Guard Workers, where the Court stated in a footnote that refusal to redress an otherwise actionable wrong creates disrespect for the law and encourages the victim to take matters into his own hands. And I think that we

would not like to be encouraged, as representatives for employers, to use the kind of self-help remedy which would create the kind of industrial warfare which the central theme of the National Labor Relations Act is to put the parties together at the bargaining table and say you negotiate in good-faith. We believe that if there is a third avenue, don't accept, don't strike, but play games in the plant, we feel that this will upset that delicate balance that has evolved over the years in many decisions, board and court decisions. We feel it will tip the scales.

I have nothing further.

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

You have one minute left on your side of the table, counsel, if you wish to use it.

ORAL ARGUMENT OF GERRY M. MILLER, ESQ. -- REBUTTAL

MR. MILLER: Thank you, Mr. Chief Justice. I will be very brief.

I would like to refer the Court -- and this is in response to a question asked by Mr. Justice White -- to petitioner's appendix, page A-32, paragraph 12, where you will find a finding by the Commission's Examiner, affirmed by the Commission with respect to the non-required optional nature of the overtime.

In answer to Justice Stewart --

QUESTION: You say it was found not required?

MR. MILLER: Yes, Your Honor.

In answer to Justice Stewart's question about focusing, is there legislative focus on partial strike activity, the answer, of course, is, first of all, what Mr. Come gave you, and, secondly, I would point out that the broader test must be used with respect to the Morton analysis because where are you going to find a legislative focus in so many words, in quite the same way you found in 8(b)(4), secondary boycott pressures, with respect to employer weaponry, the lock-out, the unilateral change, the right to replace.

Third, and this is my basic answer to Mr. Mallatt, the Insurance Agents rationale disposes of every argument Mr. Mallatt made here because they were there made by the counsel for the NLRB in support of its decision, finding it to violate federal law. Every point he made was argued by the board in Insurance Agents and rejected in an opinion by Justice Brennan by this Court, for considerations that must oust state power as well as federal agency regulation of that conduct.

If I may, 14(b), Mr. Chief Justice, permits the states to regulate union security. Section 10(a), as this Court just got through recognizing in the Immigration Act case, presents a very comprehensive and preemptive legislative scheme under Taft-Hartley that makes section 14(b) a union shop a very, very limited exception in favor of state jurisdiction.

Thank you.

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

[Whereupon, at 1:06 p.m., the above-entitled case was submitted.]

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