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In the

Supreme Court of the United States

E. I. MALONE, COMMISSIONER OF LABOR AND INDUSTRY FOR THE STATE OF MINNESOTA,

APPELLANT,

V.

WHIT MOTOR CORPORATION AND WHITE FARM EQUIPMENT COMPANY,

APPELLEES.

No. 76-1184

Washington, D. C.
January 10, 1978

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IN THE SUPREME COURT OF THE UNITED STATES

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E. I. MALONE, Commissioner of Labor and Industry for the State of Minnesota,

Appellant,

v. : No. 76-1184

WHIT MOTOR CORPORATION and WHITE FARM EQUIPMENT COMPANY,

Appellees.

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Washington, D.C.
Tuesday, January 10, 1978

The above-entitled matter came on for argument at 1:30 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

RICHARD B. ALLYN, Solicitor General, 515 Transportation Building, St. Paul, Minnesota 55155; for the Appellant.

ALLAN A. RYAN, JR., Office of the Solicitor General, Department of Justice, Washington, D.C. 20530; as amicus curiae.

FRANK C. HEATH, Esq., 1700 Union Commerce Building, Cleveland, Ohio 44115; for the Appellees.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 1184, Malone against White Motor Corporation.

Mr. Allyn, you may proceed whenever you are ready. Excuse me; in Minnesota I must address you as Mr. Solicitor General.

ORAL ARGUMENT OF RICHARD B. ALLYN, ESQ.

ON BEHALF OF THE APPELLANT

MR. ALLYN: Mr. Allyn is just fine, Your Honor.

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

White Motor today asks you to apply your doctrine of labor law preemption to strike down a state statute, a statute which, if given effect, would to some large extent make sure that about 1200 or so retirees of a plant that has been shut down get their pension benefits. We believe our statute should not be preempted for three reasons.

First of all, Congress has specifically empowered the state to regulate in the area of pensions.

Secondly, we believe if you apply your standard and traditional case analysis where Congress is silent that our statute will pass muster.

And, finally, we believe that this limited falls within that area where the state may regulate under their police power to look out for the health and welfare of their citizens.

Mr. Chief Justice, I have ceded ten minutes of my argument to counsel for the United States who will address especially this last issue, and I will try make sure I watch my clock accordingly.

This case was commenced in federal court up in Minnesota in front of Judge Alsop in 1975. He ruled that the state statute was not preempted. The three-judge panel Eighth Circuit disagreed, and that is why we are here today.

If I may say at the outset, it seems to me that the issue before you today is whether or not a state can regulate pension plans so as to ensure that retiring workers get their promised pensions notwithstanding that their regulation disregards a provision of a collectively bargained pension plan which would permit an employer to escape its pension liability.

Q You would not be making that argument if the federal law had clearly said that the states could not pass this sort of law, would you?

MR. ALLYN: That is correct, Your Honor.

Q So, you are not challenging the constitutionality in any substantive due process level.

MR. ALLYN: Those issues are not here today; questions of due process, contract--

Q They are pending.

MR. ALLYN: --and so on and so forth are still down below, Your Honor, although a companion case that is pending before you for consideration on whether or not to take jurisdiction did pass upon constitutional issues other than preemption. That is called Fleck v. Spannaus, and in that case a three-judge panel ruled that the statute did pass constitutional muster under these other theories.

I would like to describe to you briefly, if I can, the act that is here under attack. It is called the Minnesota Private Pension Benefit Protection Act. I am going to call it the Pension Act for short. It was adopted in April of 1974 by the Minnesota legislature about four and a half months before ERISA was adopted, the Federal Employees Retirement Income Security Act, and it is very important. It was designed to eliminate two of the most common errors or problems that have crept into the pension plans' guarantees to workers through the years. One is pension plans that create impossibly difficult vesting provisions; and, secondly, underfunding of the pension plan and then disclaiming liability when they terminate the plan.

To meet the difficult vesting problem, the state said that if a person works for their company with a pension plan for ten or more years, they at least qualify--their service starts to qualify, to count to their pension.

To meet the second problem, underfunding and liability disclaimers, the statute set up this system. It said if a company wants to go out of business, they are to notify the

Commissioner of Labor and Industry of Minnesota, and he in turn conducts an investigation to find out what the pension obligations were and whether or not there is enough money in the pension plan to meet those obligations. He then notifies the company as to something called a pension funding charge, which is really nothing more than the difference between the amount of money the company did set aside and the amount of money needed to meet the pension obligations as they appear at that time.

Q Do you think that a constitutional right to travel extends to corporations or just to persons?

MR. ALLYN: I am speechless and cannot answer that. I had not contemplated that in light of this case, Your Honor. I think my experience with constitutional law is that some constitutional provisions protect corporations and some do not. I know the Fifth Amendment does not, and the Fourth Amendment does. I guess I am not prepared to knowledgeably answer that, and I apologize to the Court.

Now, what happens is that the Commissioner of Labor and Industry, after he notifies the company of this amount of money, the company is supposed to go out and purchase annuities, and these annuities are nothing more than an insurance policy or bond which, when it pays off, will pay off on a monthly basis the amount of pension benefits the employee would have got under the terms of the pension plan. The Minnesota statute does not set up a benefit level.

One of the critical features of this act and of course lies at the heart of this lawsuit is our statute makes the company liable for its pension promises. Pension promises cannot be disclaimed by saying, "Well, we are only liable insofar as the amount of money that we in our wisdom decide to set aside in the fund." It is an important difference, and it will be more clearly shown as we go on.

Q Did the employer's contributions meet the requirements of the collective bargaining contract?

MR. ALLYN: Your Honor, there is nothing in the collective bargaining contract that I know of that specifically tells them how much to put in. The pension plan, as a matter of fact, is an adjunct, if you will, separate and apart from the collective bargaining contract. The promise to pay the pension is in the pension plan. The benefit levels is in the pension plan. The other rights are in the pension plan. But it is up to the company to determine how much money they are going to put in there to meet the obligations that they are incurring.

Q Would an employee have had an individual contract right against White for failure to comply with a promise contained in the pension plan?

MR. ALLYN: Mr. Justice Rehnquist, we believe that it is possible that they might. No employee has commenced such an action. The reason I think it is possible is this. The evidence shows that for the 22 years this pension plan was in effect the rank and file--the people out there in the machine shop and what not--believed they had a pension plan, acted in accordance. Every few years there was a negotiation; benefit levels were increased; people started to retire, started to get pensions. Right up to within a week or two before this pension plan was terminated, the company was sending letters to employees, telling them what their full pension benefits would be. I believe there is at least an arguable claim that there may be a quasi-contract argument between the employee and the pension fund and perhaps even the labor union. It is not an issue in this case, but it is certainly something we have given some thought to.

Q The terms of the pension plan were in writing and were available for anybody to see, were they not?

MR. ALLYN: Unquestionably. We do not deny it. And the fact that the pension plan contained this provision--the company has limited its liability to the pension plan. In other words, you could not go against the other people and so on. That is in the pension plan. And the fact that they could terminate it at any time was in the pension plan.

Q In other words, consented to by the bargaining representative of the workers?

MR. ALLYN: No question about it. Those provisions, as far as we know, were in the pension plan from the first time it was ever enacted in 1950, which pre-dated the years that White Motor came on the scene. So, we do not run away from the fact that our statute has the effect of disregarding or, if you will, modifying--I really think it is more accurate to say modifying--the provisions of that pension plan.

And the way it modifies it is simply this; is that when the company expends all the money they have in that fund to pay off the pension, our statute permits the state to then go back to the corporation as a whole and seek to recover it there. It has not happened yet in this case. We have not got to that stage of the proceeding.

I think the important point to make here is that ERISA, Employee Retirement Income Security Act--I assume the Court has heard arguments about this law before--came along about four and a half months later and in effect has preempted our statute. Our statute went out of effective existence as to future matters January 1, 1975. So, we are in a peculiar, one-time-only situation here. There is no dispute either that ERISA's protection does not apply to what has gone on in this case.

Turning to the facts, Minneapolis-Moline Company was a resident of Minnesota for many, many years, a farm implement manufacturing company. Starting about 1950 the hourly workers in the plant had a pension plan. And when White Motor purchased the company an about 1963, the pension plan, labor agreement and so on were taken over and have continued ever since. It is the 1971 pension plan that is at issue here. There has not been a new one negotiated since then.

The plan does provide, as I said, a few things that are different. There is one other difference, and that is they would say that an employee does not vest unless he not only works ten years but also has to be 40 years of age. I would argue that is different in our statute. Our statute says ten years employment. As a matter of fact, from our evidence, the number of people involved in this case that are affected by that is tiny.

There is evidence in the record--and I would like to just state this before we move on to how the dispute came to this Court--that the pension plan through the years was used to attract and keep highly qualified and hard-working loyal work force. And, secondly, that it was used by the company to keep wage increases depressed. Evidence is unrebutted and it is in the appendix.

So, I am going to take issue right now with something the Eighth Circuit said, and that is that while perhaps the employees got higher wages in return for not putting money in the pension plan, it is just exactly the opposite. There is evidence here that people worked for the company for 33 or so years--a timekeeper, as I recall, and his top salary when he retired was $10,000.

Q Were not the terms of this pension agreement open to collective bargaining every time a collective bargaining contract expired?

MR. ALLYN: Yes, they were, Your Honor. No question about it. Every term presumably is subject to negotiation.

What has happened here in 1972 is that the company--

Q Then how do you escape the proposition that the Minnesota statute has intervened and implanted and grafted onto the collective bargaining contract a new dimension?

MR. ALLYN: Your Honor, what our statute has the effect of doing is saying the company must live up to the pensions that they have been promising for lo these 22 years. The bulk of the pension plan is a pension plan. It is not an escape clause.

Q In order to defend the content and nature and contours of a promise, you look to see what the promise was, and this was in writing, available for anybody to inspect. And there is no claim here, is there, that White Motor did not keep its promise to anybody--

MR. ALLYN: Your Honor--

Q --as that promise was spelled out in the pension plan, which was the product of collective bargaining?

MR. ALLYN: There is no question that White Motor wanted to live up to its promise to get out when it wanted to; that is true. I ask you to look at the provisions they are asking to activate. They are not living up to the promise to pay a pension. They are not living up to a promise to pay certain--

Q Are there specific promises in the written agreement which Justice Stewart is referring to that White is not living up to?

MR. ALLYN: Well, if you will--

Q The question can be answered yes or no.

MR. ALLYN: Under my view of the facts, yes. The part they are not living up to is the pension promise, Your Honor.

Q That is, you are referring to some specific provision in the written pension agreement?

MR. ALLYN: The pension plan says that you work for so many years, you come to retire. A benefit level is computed, based upon all the numbers--

Q You just do not want to look at all the promise though because the promise says, "But we do not need to do it beyond a certain point if certain things happen."

MR. ALLYN: That is true, Your Honor.

Q Is that a promise that is being breached or not?

MR. ALLYN: The statute has the effect of disregarding, if you will, the term of the collectively bargained pension plan.

Q So, the statute is changing the contract the parties made?

MR. ALLYN: I would agree with that.

Q Was there a contract clause claim made in this case at all?

MR. ALLYN: Yes.

Q And that has not been resolved?

MR. ALLYN: It has not been resolved in this case; in a similar case it has been resolved as far as the District Court three-judge panel, and they resolved it against the company. But let me address what the Chief Justice I believe is getting at, Your Honor.

Q I think all three of us in the last three questions are all directed at the same proposition. Has this statute--has the Minnesota legislature engrafted a new term or provision on the contract, on the collective bargaining contract?

MR. ALLYN: The answer is that it has added an additional obligation. So, I do not mean to fence it in. I am trying to---

Q More than one, more than one additional obligation. It has eliminated the requirement that age 40 need to be reached, and it has added the requirement that these be full faith and credit plans. And it has prohibited the company from terminating. All three of those are terms additional to the pension plan that was negotiated, are they not?

MR. ALLYN: Your Honor, it did not prohibit the company from terminating the pension plan. That is not so. The statute does not prohibit them from terminating the plan at all. What it said was that when you terminate the plan--

Q You have to pay a good deal of money.

MR. ALLYN: And if there is not enough money in the plan, then you can look to the assets of the corporation.

Q It is a distinction without a difference. You can terminate the plan, but you have to pay up as though it were not.

MR. ALLYN: You have to pay up to the pension promises that the workers thought were made.

The contract clause issue here is a difficult one. I think we can establish--

Q Is that issue here?

MR. ALLYN: No, it is not, and maybe I had better avoid it right now.

Q I think it is a supremacy clause issue here.

MR. ALLYN: Yes, it is, Your Honor. We believe--

Q Which we normally would reach first.

MR. ALLYN: Yes, Your Honor.

We believe that you should, in deciding this case, in deciding the issue before you, look to see whether or not Congress has evidence, belief or intention that the states could regulate pension plans over and above any kind of contract plan. And we argue that the Pension Disclosure Act of 1958, plus the adoption of ERISA, is evidence of the fact that Congress believed the states were free to regulate the administration and operation of pension plans.

Q Nobody quarrels with the thought that a state could make it a criminal offense to embezzle these funds or even to impose preventive procedures to prevent misuse of these funds and so on. But this is changing the substantive terms of it, which is quite different from regulating, is it not?

MR. ALLYN: Your Honor, it could be, but in our case, when you look at the language in the statute, the specific language, to see what Congress intended and then match that to the kind of ills and the problems that Congress was looking at-- there was underfunding, liability disclaimers, difficult vesting provisions.

Q But these were all provisions agreed to by both of the negotiating parties to the contract, were they not?

MR. ALLYN: No question about it, Your Honor.

Q Was this a compulsory subject to bargaining, do you think, under the federal law?

MR. ALLYN: I think pension plans are no doubt a compulsory subject to collective bargaining.

Q Do you think that a state could have said, "Awfully sorry, but nobody may adopt a pension plan"?

MR. ALLYN: No, I do not, Your Honor.

Q And could they say, "Nobody can adopt a pension plan unless our Director of Labor consents"?

MR. ALLYN: No, I do not, Your Honor.

Q Could they say every collective bargaining agreement must contain a pension plan? Could the state say that?

MR. ALLYN: No, Your Honor. No, we do not. We are just simply saying that if you are going to terminate your plan, look out for those people that you have been making a promise to for a long, long time. And I think that that has got to be the essence of the operation, administration, of the pension plan. If you do not put enough money into it, what kind of pension plan do you have?

Q How do you distinguish the Oliver case?

MR. ALLYN: Thank you, Your Honor, in my remaining few seconds. Oliver, we believe, is dramatically different. In that case the state statute struck down the heart of the wage structure. There is no question about it. The state antitrust statute.

Our statute did not come along and mandate or strike down the heart of the pension plan. As a matter of fact, our statute has the effect of upholding what we would say is certainly the intention of most of the people, the employees, that they thought and planned on for over 22 years. So--

Q The federal law is that you do not force parties to come to an agreement. You ought to bargain it out. And the state is in effect saying that if you are going to bargain about this, you must have one--there is one thing you cannot agree to; you cannot agree to a no-pay termination.

MR. ALLYN: What we are saying is that if you are going to terminate, your company has got to look to its assets to stand behind the pension obligations and you cannot just escape by having a pension fund and not putting any money in it. I do not mean to imply they did not put any money in it. There are some small benefits now being paid to these workers. We are not claiming here they are at death's door.

Q Can a state put on a minimum wage--

MR. ALLYN: Yes, Your Honor.

Q --higher than the bargained-for wage?

MR. ALLYN: Congress has said it can set minimum wages, Your Honor. So, I guess, yes. The answer is yes. If Congress says we can do it, then we can do it.

Q And you think it has said this about pension plans?

MR. ALLYN: No question about it, Your Honor. And that is where we are different from Oliver. This is really an important point. In Oliver you do not have any kind of congressional statement to the state, "Go ahead and set up an antitrust law to prohibit the kind of thing they were after." In our situation Congress said in the Pension Disclosure Act and in ERISA indirectly that--

Q I understand your independent argument based on evidence of congressional intent to leave the states--but putting that to one side, is there any distinction?

MR. ALLYN: I think there is no question, and we admit that our statute varies the term of collective bargaining agreement. It is, in our judgment, so minimum and so not contrary to the purposes of the NLRA, we would ask you to look at that and note--

Q Minimal? Seventeen million dollars?

MR. ALLYN: All right, let me just clear that up. My time is up. The fact of the matter is since the $19 million assessment was set, the commissioner holds a hearing and at that hearing it is for certain going to be reduced by $7 million, which is the amount in the so-called guarantee letter they set. It is going to be reduced by the amount of money they have now put in their new pension plan in the plant and the amount of money that has been paid since an arbitrator's award. Our reply brief addresses this, and it says it is going to be between six and eight million dollars.

Thank you very much. I would like to cede what little time there is left.

MR. CHIEF JUSTICE BURGER: Very well. Mr. Ryan.

[Continued on page following.]

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ORAL ARGUMENT OF ALLAN A. RYAN, JR., ESQ.,

AS AMICUS CURIAE

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

The United States supports Appellant Malone in this action, and we urge that the judgment below be reversed. In our view, the Court of Appeals erred in holding that the National Labor Relations Act preempted the authority of the state to enact the Minnesota Pension Act.

The law of preemption is largely judge made, but its constant touchstone is the presumed intent of Congress, and we think that in this case the intent of Congress is clear. It was expressed in the Disclosure Act of 1958, which we discuss in our brief. That act required that the financial operations of pension plans be made public. But Congress said, and I quote: "We leave to the state thr detailed regulations relating to insurance, trusts, and other phases of the pension plan's operations," end quote. And, quoting again, "This legislation by design endeavors to leave regulatory responsibility to the states."

Q Do you think the state could forbid a pension plan?

MR. RYAN: I do not think that, Mr. Justice White, because--

Q Could it forbid a pension plan unless it provides no cancellation?

MR. RYAN: It could in effect provide that any pension plan written in this state must have a termination insurance program. So, I would answer that question yes.

Q Could it provide that any pension plan in the state must provide at least 60 percent of the wages earned in the last three years of employment?

MR. RYAN: I think it could under this scheme.

Q Notwithstanding a prior agreement?

MR. RYAN: Yes, not--

Q I am speaking of an act passed now--that is what we have, an act passed long after a collective bargaining agreement had set up a pension plan.

MR. RYAN: I think the retroactivity question of the Minnesota legislation is not before the Court now. It is simply a question of whether--

Q It is retroactive, is it not?

MR. RYAN: It is retroactive, indeed.

Q Yes.

MR. RYAN: But I think that the question of whether Minnesota can pass this statute and impose its terms on the parties is not before this Court except for the preemption, the supremacy clause argument.

Q This is even though pension payments might be called part of wages?

MR. RYAN: In an industrial sense, yes, they might be called a part of wages. But that is to say no more than if Congress sets a minimum wage of $2 and says the stakes can go higher, then Minnesota could certainly say the minimum wage in this state is $3, and it could require the parties to stop--

Q And why is that?

MR. RYAN: Because Congress has said in--I believe it is the Fair Labor Standards Act--Congress has said the stakes can go higher. And we submit that in this case Congress has said in the Disclosure Act, in the pre-ERISA days, Congress said, "And the states can regulate pension plans."

Q It has said that, but you are just saying that means almost everything, including the termination dates, level of payments.

MR. RYAN: It includes everything Congress had in mind when it said states my regulate pension plans. And we think the Disclosure Act supports the conclusion that that includes the ability of the state to say that pension plans shall be of a certain level of benefits and so forth. It does not include the state saying, "There shall be no pension plans" or the state saying, "There must be a pension plan," because under Inland Steel that is a mandatory subject of bargaining, and the state cannot say otherwise.

Q Your submission is at least it is very clear that there are some things a state can do that the parties to a collective bargaining agreement cannot agree not to do?

MR. RYAN: Cannot set aside.

Q Yes.

MR. RYAN: That is correct.

Q Or some things, anyway.

MR. RYAN: There are some things.

Q Would this be one example, that the state law would require that no official of the union be a trustee of the pension fund and that no official of the company be a trustee, that it must be a mutual and independent trustee?

MR. RYAN: I believe before ERISA that would be a permissible state regulation because I believe the Disclosure Act does not address that. Therefore, it is one of those things that Congress left to the states.

Q That would be regulation without any substantive change, however, would it not?

MR. RYAN: It would be.

Q I take it then your position also is that absent the Disclosure Act, there would be preemption?

MR. RYAN: Absent the Disclosure Act, that is not our position, Mr. Justice White.

Q So, you go beyond that even without the Disclosure Act?

MR. RYAN: Even without the Disclosure Act, we would say that regulatory responsibilities lie in the first instance with the state--

Q Even though it is a mandatory subject to collective bargaining and even though the labor law policy is not to force agreements on the parties?

MR. RYAN: That is true.

Q Would you say despite that, the state would have the power?

MR. RYAN: Despite that, the state would have the power. We believe the Court of Appeals was wrong in one respect when it said in effect that the states have only the power that the Disclosure Act of 1958 gave to them. We think the opposite is the case. The state had plenary power, except what the Disclosure Act took away from them and except for interfering with the doctrine--

Q And what the National Labor Relations Act might have taken away from them?

MR. RYAN: Of course.

Q Do you think the state could pass a law saying that any wages bargained for in a collective bargaining unit agreement have to be paid the day after they are earned, regardless of any provision to the contrary in the collective bargaining agreement?

MR. RYAN: I would think that that is probably a matter where the states would be preempted by the National Labor Relations Act. So, the--

Q Why there and not here?

MR. RYAN: Because I think in this case Congress left regulatory responsibility of pension plans to the state.

Q I thought your argument did not depend on if this were the withholding act; it was just the plenary powers of the state had not been removed by the withholding act.

MR. RYAN: Well, the Disclosure Act.

Q Certainly Congress has never even addressed itself to the subject when wages should be paid.

MR. RYAN: Following the National Labor Relations Act, in the years between that act and 1958 when the Disclosure Act was passed, I think it would have been a nice question. It would have been a difficult question. I think in 1958, from then until 1974, Congress made it an easy question. They said specifically we leave regulatory responsibility in this area of pension regulation to the states. In 1974 they took it away. But at least in those 16 years, if not before, the states had the power to do this.

Q Could the state legislature provide that the minimum increase each year in collective bargaining negotiations must reflect the Bureau of Labor Statistics cost of living?

MR. RYAN: I think not, Mr. Chief Justice. I think that gets too close to--perhaps I speak too soon. If, as we assume, the states can set a minimum wage higher than the federal wage--and I think that is true, and Congress has specifically said so in the Fair Labor Standards Act--then I misspoke. There would be no problem in the state saying the minimum wage in this state is whatever the federal index is, plus two percent, or whatever they choose to do. The states do have the power in the wage area to set a higher minimum wage than the federal minimum wage.

Q My question did not go to minimum wages. It goes only to the annual negotiations, at which time the Labor Act certainly guarantees the employer the right to say no increase at all, does it not?

MR. RYAN: It normally would, yes, sir.

Q Normally. Not always?

MR. RYAN: Is your question, Mr. Chief Justice, a state act that speaks only to collectively bargained agreements and not to others?

Q All. I am simply saying that the employer now has a right surely, under the labor law, to say, "I am very sorry; business is very poor. We cannot give you any increase this year." Do you agree with that?

MR. RYAN: Yes.

Q Even though he then listens and takes part in bargaining in the usual way. But you say the legislature could come along and say, "The starting point is 6.3 percent increase because that is what the Bureau of Labor Statistics has designated as the increase in cost of living?

MR. RYAN: On those facts, I would say no, because then you are not talking about a minimum wage; you are talking about a worker who might be earning $20,000 a year is still entitled to a 6.3 percent increase this year, and that is not a minimum wage provision, and that is preempted by the National Labor Relations Act.

Q Mr. Ryan, assume you did not have the Fair Labor Standards Act's express recognition of the state's power to set a minimum wage; you merely had the Wagner Act and the Taft-Hartley Act. Would the state have the power to set a minimum wage higher than a contract wage?

MR. RYAN: In our view, no, Mr. Justice Stevens, it would not.

Q Because of the--

MR. RYAN: Because of the preemption.

Q Even if it was statewide?

MR. RYAN: Even if it was statewide.

Q Because of the collective bargaining system; is that it?

MR. RYAN: Because it would be preempted by the Fair Labor Standards Act. There is an explicit provision--

Q I understand that. But suppose there were no Fair Labor Standards Act at all.

MR. RYAN: Suppose there were no Fair Labor Standards

Act at all?

Q I thought that was Mr. Justice Stevens--

MR. RYAN: Oh, I am sorry.

Q Assuming no Fair Labor Standards and the State of Minnesota decides the minimum wage in Minnesota is going to be $5 an hour and every collective bargaining agreement may have only reached $4 an hour. Are you saying the state has no power to do that?

MR. RYAN: No. The question that I was answering--I misunderstood you--was that if there were no provision in the Fair Labor Standards Act saying the states can go higher--

Q That is right. I am assuming there is just no federal statute at all on the minimum wage.

MR. RYAN: Does your question assume there is federal minimum wage or not?

Q No.

MR. RYAN: There is no federal minimum wage.

Q The only federal labor policy is that set forth in the Wagner Act and the Taft-Hartley Act.

MR. RYAN: I see. There is no federal minimum wage. Can the State of Minnesota impose a minimum wage on its own?

Q Yes.

MR. RYAN: That is a difficult question, I must say.

Q It is the same question that this case presents, is it not?

MR. RYAN: No, I do not think it is the same question that this case presents. The difficulty in that question--there is no such thing as an easy labor preemption question. I think we start from that point. And in your hypothetical, sir, I think it would be a very, very difficult question because you would have to set aside 20 years or 30 years of congressional history and go back then.

Q Is there any case close to that except Oliver? Oliver is like that, but what other cases say that a state cannot affect the end result of the bargaining process as opposed to the process itself?

MR. RYAN: A case that says a state cannot affect the end result of the bargaining process?

Q Cannot dictate what terms the parties may agree upon.

MR. RYAN: I think--and I do not have the citation--but I believe there are cases, if not from this Court then from lower ones, which uphold the authority of the states to set, for example, writing requirements or sanitary standards, things of that nature. I do not have the citations but I think it is that police power exception, if you will, or the health and welfare exception, which we think is the well spring from which the 1958 act comes in this case. We think that '58 act fits in very comfortably with the history. Congress has demonstrated intent to preserve to the states their health, welfare, safety, and police powers.

Q I take it your first assumption is you do not have to reach these tough questions because of the Disclosure Act--

MR. RYAN: Yes.

Q --that Congress has expressly saved state power.

MR. RYAN: That is our position, Mr. Justice White, and I think the Disclosure Act, I would say, as augmented by the legislative history of ERISA--we think those go hand in hand. But that is our position, that this Court in this case need not paint the entire canvas, if you will, of the health, welfare exception to preemption.

Q Unless we disagree with you on the Disclosure Act.

MR. RYAN: Unless the Court disagrees with the Disclosure Act.

Q Then we are in the Oliver territory and this question you were debating with Justice Stevens.

MR. RYAN: That is correct. If the Court finds that the Disclosure Act and ERISA is not persuasive evidence on this point. We believe it is very persuasive.

Q Mr. Ryan, I understand that under the Fair Labor Standards Act, a state may set a minimum wage higher than the federal level.

MR. RYAN: Yes, sir, that is my understanding.

Q Do you think the state could do that retro-actively say after ten years?

MR. RYAN: To--

Q Require employers to pay additional wages for ten years contrary to the terms of bargaining agreements that had been in effect.

MR. RYAN: To pass in 1974 a statute saying the minimum wage is x-dollars per hour as of 1964, and everyone who did not earn it in that ten-year period is now entitled to it retroactively?

Q Right.

MR. RYAN: I think there are substantial contract clause problems presented by that situation.

Q Quite apart from that though, having in mind the impact on collective bargaining agreements already negotiated.

MR. RYAN: My inclination would be to say that they presumptively could do that, subject to whatever other arguments may be made on the other side. By that I mean I would start off by saying the setting of minimum wages is an aspect of the state's police power. Whatever problems may be presented by doing it retroactively would certainly have to be contended with. But I would start by saying--

Q That is a contract clause question, is it not?

MR. RYAN: I prefaced my answer to Mr. Justice Powell by saying yes. But aside from contract clause problems--and there may well be other problems--but I would start off by saying the states can do it unless they were convinced otherwise. But that is an aspect of their police power or their health and welfare power or whatever you choose to term it.

Q Mr. Ryan, before you sit down, may I ask you a question?

MR. RYAN: Certainly.

Q As you know, the amicus brief of the AFL-CIO in this case takes the position, first of all, that we should reverse the Court of Appeals. But, secondly, if we do not, that we should limit our decision in this case to the question of preemption of federal labor law by the impact of these state laws only on existing collective bargaining agreements, i.e., if you will, the retroactive effect of this state law.

I understood you a moment ago or a few moments ago to say in answer to a question to a question propounded to you by the Chief Justice that that issue could not be decided here, that that was not in this case, the retroactivity. Did you mean that that was not covered by the grant of certiorari or what?

MR. RYAN: The short answer to that is I would agree that the Court could, if it wanted to, reach the result propounded by the AFL-CIO.

Q That that is covered by the--

MR. RYAN: It is in the case to this extent.

Q --by the question presented in the petition for certiorari, is it not?

MR. RYAN: Yes.

Q To that extent at least, is it not?

MR. RYAN: Yes. Yes, it is. My point was that the question of whether Minnesota, assuming it is empowered to act at all in this area, could act in this particular way, is not before the Court. The contract clause questions, the due process questions and so forth. I believe all sides have stated separately--

Q The preemption question is the only question before us.

MR. RYAN: It is the only one before the Court.

Q But there is no reason why we could not consider the question of preemption only insofar as this state law impacted upon an existing collective bargaining agreement. That is correct, is it not?

MR. RYAN: That is correct.

Q Which is the fact in this case.

MR. RYAN: Which is the fact in this case.

Q All right, thank you.

MR. CHIEF JUSTICE BURGER: I think your time has expired, Mr. Ryan.

MR. RYAN: Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Heath.

ORAL ARGUMENT OF FRANK C. HEATH, ESQ.,

ON BEHALF OF THE APPELLEES

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

To hear the argument and to read the briefs of the state and Labor Board, as I call the other brief, one would think that there are grave questions of fact undecided in this question of preemption. And that is not true. Let us restate the operative facts that relate to the question of preemption.

Counsel inferred and I think said that there were labor contracts negotiated but not pension plans and that the pension plans did not say what funds had to be put in. That is not right. All the pension plans, from the first pension plan in 1950, were collectively bargained. Every amendment to those plans was collectively bargained. Those plans were made part and parcel of collective bargaining agreements. Every pension plan that was negotiated contained pension schedules and not as a separate but as a separate provision but as part of the contract itself.

Two very important provisions which are clear and unambiguous and were not put in fine print. One, Section 609 of the Pension Plan, "Pension shall be payable only from the fund, and rights to pensions shall be enforceable only against the fund." And in a separate section of the plan which, if you please, was collectively bargained and negotiated and ratified by the union--"Neither the company nor any trustee or pension committee or any member thereof shall be liable therefor"--therefor being payment of pension benefits--"in any manner or to any extent."

We do not have here a promise, and the state would like to say a disclaimer of a promise. That is made clear when you understand what pension plans were like and the kind of problems that arose from funding of pension plans. When pension plans were put in for the first time or when they are increased, credit is given to service of employees, not just service that they will have from that point forward but service that has taken place in the past, perhaps not only with this employer but with predecessor employers. The result is in giving credit for that, you get a paper figure, and I will explain it in a minute. That is called a past service liability. It is a contingent liability because it comes into play only if the pension plan continues in effect, only if the employee continues in employment to qualify for a full pension or at least, if he quits, has enough service to qualify for a deferred vested pension.

Unions--and the UAW that negotiated most of these agreements is a strong, experienced, and knowledgeable American union--they and other unions recognized that the only way to get agreements on pensions was to have a deferred funding arrangement under which past service liability--this credit system--would be paid over a period of many years. And that was provided in this plan in 1971, which is the key point. The pension plan by negotiation provided that these credits that were given to employees for past service would be funded over a period of 35 years, a long time and created uncertainty. But to have what Minnesota has decreed here, instant funding, would create a situation which would make it impossible for companies. And they would not have agreed to pension plans because if they put a pension plan in, five or ten years later the plant had a misfortune and they had to close it, they would have a liability that would be out of all proportion to what they could stand.

So, there was a reason for deferred funding, which was common. What that background, what was the situation in 1971?

As I said, there was an agreement between the union and the company, the union being the collective bargaining agent for all these employees. There was an agreement for 35-year funding, which I have just described. The union knew in 1971 that during the three-year period from '69 through '71 this farm division of White Motor had lost $21 million. The UAW being knowledgeable also was aware of the fact that the plan was far from truly funded. And in that situation, although the company already had for '71 an agreement that we will put in so many dollars each year to fund this over a long term, the union came in--and this is a great example of collective bargaining--the union came in and said, "We are concerned. We want to bargain with you about guaranteeing pensions if the plant is closed and the plan is terminated." And that is what the very pension guarantee that was negotiated in 1971 said, and that is on page 172 and 173 of the appendix. It expressly provides for just that circumstance. And the union in the circumstances, when you consider that it was dealing with a company that was suffering losses, did a remarkable job because they obtained from White an agreement in addition to its funding obligation that if through unfortunate circumstances this plant were closed, White would guarantee pensions at a certain level which actually, as the record shows, produced an additional obligation of $7 million. What White agreed to guarantee were pensions for years of service with White itself at the level provided in the 1968 plan and agreement, and lower pensions for years of service with prior employers.

That was the situation in 1972. The unfortunate circumstances resulted in the closing of the plant. The collective bargaining agreement terminated in 1974. The company has honored all of its commitments, and the suggestion that there are lurking in the background contract actions is simply not so. That is simply, I am sorry, an attempt to create facts that are different from what we have here.

What the state did--and this is where retroactivity clearly comes into preemption--the state has said time and again, and it is in their brief, "We did not interfere with your collective bargaining process in 1971. We let you go ahead and make the agreement." That is right, but what they did in 1974, 20 days before the agreement was to terminate, was to come in and change the qualifications for eligibility for vested pensions, impose on the company in the event of termination of the plan immediate payment through annuities of all pensions, instead of the limited liability through deferred funding.

Q What if under the collective bargaining agreement there had been extensive provisions, assuming the company is engaged in the business of coal mining--extensive provisions for maintaining the safety of the mine that had been agreed to in the process of a collective bargaining agreement in 1971 and three years later the State of Minnesota enacts a provision that is much more stringent than that provided from the collective bargaining agreement. Would that, in your view, be preempted?

MR. HEATH: That depends on how this Court interprets what is called its local interest exception and the safety and health provisions set forth in Oliver. That could be preempted under the rather tight standards which seem to be in machinists and seem to be set in the two bus employee cases. On the other hand, strictly on the language of Oliver, where that is a true safety standard, you could avoid preemption. And I am not in a position to tell you precisely where that point is, Your Honor. But I am in a position to say to you that the local safety and health regulation referred to in Oliver and included in the local interest exception does not include--as the state and the solicitor general argue--it does not include all actions taken for economic welfare of employees or all actions taken for the general well being of employees because, if so, you wipe out completely the doctrine of labor law preemption, and with it you seriously undermine collective bargaining.

Q It would cover a situation arguably, a situation such as my Brother Rehnquist has described and certainly a situation such as this, assuming this were a trucking company and the collective bargaining agreement had provided that it was the duty of all drivers to do their best to drive at a constant speed of 60 miles an hour, and then the state had much later but during the existence of the collective bargaining agreement had reduced the speed limit to 55 miles an hour. There is no question about the state's power to do that and no question about preemption, is there?

MR. HEATH: No, I have no question about that.

Q And that is what the local safety and health interest means.

MR. HEATH: That is what it means. As I read the cases, there may be some variation in how far the local safety and health goes. But it does not go to economic benefit because, if so, it would do what nobody can say Congress believed should be done. It would wipe out the pension.

Q A state could not have lesser standards than the federal Mine Safety Act, could it?

MR. HEATH: No, I do not think it could.

Consequently, it is clear that we do have not only conflict between the act and the negotiated plan but what can safely be called a massive conflict. How anyone could call that conflict peripheral contact, as the state calls it, I am sorry, is beyond me.

Q Anybody call anything anything, I suppose.

MR. HEATH: And make others believe it. This was my point.

There is that conflict. Clearly then we have the next question: Does the labor law protect negotiated agreements, negotiated pension plans against that conflict? And it does, and this is where retroactivity comes in. The state acted retroactively and said, "We did not interfere with the project. All we did is change your contract." And even though we think that would also raise--and we have pleaded that it raise a contract question. The plain fact is it also raises a question which is clearly covered by labor law; not only <u>Oliver</u> but the cases which preceded <u>Oliver</u> under the Railway Labor Act said expressly that a labor agreement negotiated under that act which has the same promotion of collective bargaining theory as a labor law has the imprimatur of federal law upon it and cannot be amended or vitiated by the laws of the state. Hansen said it. Taylor said it. This Court, while the issue was not up, this Court repeated that conclusion in Insurance Agents, said there is to be no interference by the state.

Q Why is that stronger in the case of an agreement already negotiated than in a prospective agreement? I would think what is being protected is the process.

MR. HEATH: Both are being protected, Mr. Justice Rehnquist. There is not any question, and the courts have said and this Court has said, that the collective bargaining procees is protected. But you cannot get out from under by waiting until the collective bargaining process is finished and the bargain is made because part of the obligation to bargain under the act, under Section Section 8(d), as I recall it, you not only must bargain collectively but, if requested and you reach an agreement, you must put that bargain in writing.

Q But that argument only gets you a past agreement up to your present negotiation. It does not elevate it above that. No, it does not, and actually there was other interference. There were negotiations that took place in 1975 where the presence of the act interfered with it. But there is not any question that the labor law, the National Labor Relations Act, we believe protects both the process of bargaining and the bargain made. And I am not trying to say that only one is protected.

Q It is settled, though, is it not? The process of bargaining takes place against the background of existing state and federal law.

MR. HEATH: Of course it does.

Q And if, for example, state law requires that banks have certain minimum deposits and so on, collective bargaining cannot change that.

MR. HEATH: No. Broadly speaking--

Q Although a collective bargain might be perfectly valid in another state that did not have such a law.

MR. HEATH: What you say is true, Mr. Justice Stewart. There is always the condition that a state law must be one of a type that is not preempted. There has been talk here about wage and hour. The wage and hour law, when passed, was quite specific as to what states could do. We have other laws. The AFL-CIO points out all these other laws and how--they point out how very careful Congress has been to say exactly what states can or cannot do in the substantive area. Then we jump a great gap and say that having been the case in the Disclosure Act, they did that and they did not do that in the Disclosure Act, and let me talk briefly about that, if I may.

Q Just before you get to that, I assume this is a fair inference from what you said, but I just want to be sure.

It is your view, I take it, that if there were no Fair Labor Standards Act, no minimum federal law, a state would not have the power to fix a state minimum wage.

MR. HEATH: That is right, Mr. Justice Stevens, and I think that was held by this Court in 1914 in the Erie Railroad case.

Q It is a matter of preemption.

MR. HEATH: It is a matter of preemption. That is all I am talking about, is preemption. That is right.

Q Can a state have child labor laws?

MR. HEATH: Probably only if authorized,as they are, by the Wage and Hour Act. There you might get into the question of whether or not you fall into a health and safety exemption. But except for that, no.

Q What is the basis for the health and safety exemption if it does not extend to some other aspects of traditional police power too?

MR. HEATH: The basis for it was to have a very limited exception of the type which had been historically recognized.

Q Historically recognized where?

MR. HEATH: Under the Railway Labor Act, for instance, there were safety laws. And there have been for many years states--usually the industrial commission of the state may set express provisions of what safety devices must be used here and there on machines. And that kind of law had been in effect. I can only believe and assume that that is what was meant in Oliver. Actually this Court, in restating the local interest exception as it did in Machinists, perhaps stated it so tightly that it would be less broad than in Oliver.

Q Does Oliver seem crystal clear to you on reading it?

MR. HEATH: The case, the decision?

Q The language.

MR. HEATH: Yes, I think it is, Your Honor, for the purposes for which I read it.

Q I suppose a lot of people could say that with different clients from yours.

MR. HEATH: Let me say this. I have not talked about it here, but the suggestion that Oliver has viability only when you are talking about the antitrust laws simply does not have any validity because the decisions which Oliver followed, Hansen and Taylor, were not antitrust cases. And when this Court in Machinists and earlier in Insurance Agents said it is perfectly clear that we will not let a state interfere with a substantive solution of collective bargaining, they were not talking about antitrust laws. So, I do not think Oliver is limited in that sense.

Q Suppose it were clear that a state prospectively could do what it is doing here with respect to new collective bargaining agreements, that its action would not be preempted. You say nevertheless it is preempted here?

MR. HEATH: In the first place, I do not agree with the limitation which the AFL-CIO have put on Oliver here; although we are glad that except for the argument as to the Disclosure Act, which we do not think is very meaningful, they agree with us that what was done here is an intolerable interference.

Q Suppose this Court were to decide that prospectively, with respect to new agreements, Minnesota could do what it did insofar as preemption and supremacy clause is concerned. Would the issue be different with respect to past contracts as far as supremacy clause is concerned?

MR. HEATH: No. In Oliver, for instance, Oliver was dealing with an Ohio antitrust law. And the Valentine Act, which had been in effect in Ohio since the early teens, as I recall it--so, the fact that it was in effect before does not matter. And, as I recall in Hansen, the Nebraska constitution prohibiting closed shops had been in effect before, and perhaps even in Taylor--

Q Does it make the case a better case for you that the law was not in effect when the collective bargaining agreement involved here was made? Does it make it better for you as far as the supremacy clause is concerned?

MR. HEATH: I think it creates a more gross situation.

As we have said in our brief, I do not think there would be a difference. But arguably if you had a statute that was already in effect, you could bargain around it, if you please. And let me say that the Chamber of Commerce makes a very good point that that would be intolerable interference because if you had to spend all of your money, the money you had available, to satisfy the statute of a state with respect to one fringe benefit, the union could come in and say, "We do not want that fringe benefit. We would rather have longer rest periods. We would rather have some holidays. We do not want that particular benefit." And then there would be material interference with the collective bargaining process.

Q What if a bank employee said, "We would much rather you do not keep all these reserves that the state banking law requires; we want higher wages."

MR. HEATH: I do not think that is a bargainable subject by now. I think that is outside the realm of what you would need to bargain on under the National Labor Relations.

Q You have to bargain about wages, do you not?

MR. HEATH: Yes. They can say that they may not like that. I think the employees or the employees through their union have a right to say, "We do not care what reserves you keep. We think you keep too much. But whether you keep those reserves or not, we want more dollars." But I do not think they can say, "We demand that you keep lower reserves." I think

think that is outside the realm of collective bargaining. Perhaps I am getting far afield from the case here, but I think--

Q In other words, they could picket the bank, but they could not change the state's requirements for reserves--

MR. HEATH: That is my feeling, Mr. Chief Justice.

Q --or the federal requirements.

MR. HEATH: Yes. Yes.

Let me say, if I have a few minutes--comment briefly on the Pension Disclosure Act argument. I think it has on its face little weight. But it can be demonstrated to be invalid because the AFL-CIO seems to say something a little different, which maybe even has less validity. But relying upon the language that Congressmen and Senators used in the Pension Disclosure Act debate, we are going to leave to the states their traditional functions, functions related to operation and administration. "Aha," says the state; that means that they can change the terms of pension agreements because, says the state, it is not necessary to cede that power to them, and the state expressly says that in their reply brief at page 9. The state did not need to cede anything. All they had to do was leave to the states the power that it had. And that does not make sense.

The day before the Pension Disclosure Act, what was the situation? The Railroad Labor Act was in effect; it had been in effect for a long time. The National Labor Relations Act was in effect. This Court had articulated the principle of labor law preemption clearly in Hansen and Taylor and talked about the imprimatur of federal law protecting contracts. And so the day before the Disclosure Act there was not any right on the part of a state to change a collective bargaining agreement, whether it is in pensions or otherwise. They did not have that right then because if they had that right, labor law preemption is gone again. It is undermined because if the day before the Pension Disclosure Act, if the state could have said, "We are going to dictate the terms of pension agreements," they could say, "We are going to insist, if you please, as a minimum that you give everybody 30 minutes of every hour off so that our employees in our state are well rested, and we are going to give everybody a minimum of five weeks vacation," and those examples also prove, if the Court please, that there is no magic in simply saying, "All we are doing is setting minimums" because by setting minimums you can destroy collective bargaining.

If you say everybody must have 30 minutes an hour off and five weeks of vacation after they have been there one year, this is going to impose burdens, if it were valid, burdens on an employer that would be intolerable. And the employer would say, "If I have to bear those burdens, if that were valid, if I have to bear those burdens, I cannot assume other burdens."

So, on its face we think that the Pension Disclosure Act does not do anything to give the states power--it does not cede power to them, and it did not have the power to act in this way before the Pension Disclosure Act.

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

[The case was submitted at 2:33 o'clock p.m.]

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