In the

Supreme Court of the United States

SEARS, ROEBUCK AND CO.,

PETITIONER

V.

SAN DIEGO COUNTY DISTRICT COUNCIL OF CARPENTERS,

RESPONDENT.

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IN THE SUPREME COURT OF THE UNITED STATES

SEARS, ROEBUCK AND CO., Petitioner, v. SAN DIEGO COUNTY DISTRICT COUNCIL OF CARPENTERS, Respondent.	No. 76-750

Washington, D. C.,

Monday, November 7, 1977.

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

H. WARREN SIEGEL, ESQ., Jones, Hall & Arky, 900 South Fremont Avenue, Alhambra, California 91802; on behalf of the Petitioner.

JERRY J. WILLIAMS, ESQ., Brundage, Williams & Zellman, P. O. Box No. 3172, 3746 Fifth Avenue, San Diego, California 92103; on behalf of the Respondant.

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 76-750, Sears, Roebuck against San Diego County Council.

Mr. Siegel, I think you may proceed when you're ready.

ORAL ARGUMENT OF H. WARREN SIEGEL, ESQ.,

ON BEHALF OF THE PETITIONER

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

The facts of this case are relatively simple. They arise out of the Sears Chula Vista store, which is located

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somewhat south of San Diego. The store is a free-standing store, not a part of the shopping center, surrounded on three sides by a parking lot and public streets and sidewalks, on a fourth side by a block wall separating the commercial property from private residences.

In October of 1973, representatives of the Carpenters Union appeared at the store and demanded of the store manager, Mr. Ochoa, that Sears remove its employees from doing work which the Union considered to be within the carpenters' jurisdiction, and either obtain carpenters from a licensed contractor, who would obtain those carpenters from the union hiring hall, or, in the alternative, that the store manager should sign what was called a short form contract with the union.

Mr. Ochoa indicated that he would get back to the union. Apparently, for some reason, he did not. The union then placed pickets on the private property of Sears, Roebuck and Company; signs indicating simply that they were sanctioned by the AFL-CIO and that they were from the Carpenters Union.

QUESTION: Mr. Siegel, does the record show whether Sears was a member of the Building Trades Council?

MR. SIEGEL: The record does not show that, Your Honor.

QUESTION: Or that it signed the master agreement?

MR. SIEGEL: No, Sears, however, is not; but I do not believe that is in the record. If it had been so, the

union, I think, would have had other alternatives, such as arbitration provisions and so on. But Sears would have had, also.

In any case, the pickets were requested to leave. They refused to do so. It appeared -- they did leave after a while for a very short time, apparently some phone calls were made; they then reappeared on the property and indicated they would not leave unless compelled to do so by legal process.

Sears did not challenge the objective of the picketing. The signs themselves were not precise as to what the objectives were, but the conversations had beforehand indicated several alternative objectives. Sears did protest the location of the picketing.

Sears then applied to the San Diego County Superior Court for a temporary restraining order, which, in California, is a notice type hearing. The court issued a temporary restraining order; subsequently held a hearing which was on written record in California, affidavits, and in November of 1973 issued a preliminary injunction, the sole effect of which was to confine the picketing to the public streets and sidewalks surrounding the store and not the private property.

In doing so, the Superior Court considered not only the issues that arose un California State law, such as whether this was commercial property or industrial property, it considered also the necessity for maintaining the peace, the

potential for violence in a trespass type situation. It applied a balancing standard not unlike the Babcock & Wilcox standard of this Court.

After the temporary restraining order was issued, the unions did picket on the private -- strike that -- on the public sidewalks surrounding the store. At this point we come to perhaps the only issue that was really in dispute in the record before the Superior Court. Sears had affidavits which indicated that there had been effective picketing; people did decline to enter Sears property, including some who were making commercial deliveries to the store.

The union said that the picketing on the public sidewalks was not effective, but pointed to no specific instance of its lack of effect.

The Superior Court, weighing that, conflicting affidavits, believed the Sears testimony which had pointed to several specific instances of effectiveness, and did issue the preliminary injunction.

At no time during the entire process of this proceeding, which began in October, finally resulting in the preliminary injunction on November 21st, 1973, or any time thereafter, has the union filed the charge with the National Labor Relations Board.

QUESTION: Is it fairly common in California Superior Court injunctive procedures for a temporary injunction to be

issued on the basis of a written record, with consideration of affidavits on each side?

MR. SIEGEL: Yes, Your Honor. It would be unusual. The court has discretion to take oral testimony, but it's highly unusual to do so.

The issue, therefore, in this case is basically one of the procedure by which the rights of private parties are to be resolved in a peaceful picketing situation. While this arises in a picketing context, the same problems would of course be existing in whether it's handbilling or organizational activities such as Central Hardware, solicitation activities; the same basic problem arises in any kind of activity occurring on private property.

It's the position of the Petitioner that the State courts should have concurrent jurisdiction with the National Labor Relations Board to resolve these kinds of issues.

In many respects, the type of resolution that occurred in this case on a motion for an injunction is not unlike the situation where these issues are presented to a State court, for example, if an arrest had been effected. If Sears had called the Sheriff and had the pickets arrested for trespass or for some other act, the State court would ultimately -- and I don't think there would be any issue that it would have jurisdiction to do so -- resolve the criminal case, and, in so doing, would have to consider not only the elements of State

law that were involved in the particular crime, but would also become involved in what undoubtedly would be a defense, and that is that the activity on the property was in some way privileged or protected by the National Labor Relations Act.

The same thing would be true, for example, if, in the process of ejecting a union representative from the property, there was a lawsuit against the ejector for assault or battery. Again the State court would be called upon not only to resolve the State elements of those torts, but undoubtedly have to resolve a factual issue that would be raised in defense, that the activity of the person being ejected was in some way protected.

Viewed in that context, the type of issues that the State court would resolve on an injunction motion are no different than those issues on which, very clearly, there is no argument. The State court already has jurisdiction, even though the matter may have arisen out of a labor dispute of some kind.

Under Garmon, if we view this in the context of the backdrop of State law, these are the kinds of issues that State courts have been resolving since before there were States, in effect, going back to the very earliest common law actions involving trespass.

The advantage of allowing the State court to resolve this type of dispute is, of course, that it channels the dis-

puts into a neutral form, avoiding the necessity of self-help. The court would be very concerned that, should self-help be exercised, that that could very quickly lead to an act of violence.

There's no issue under the current state of the law that the ejector could use self-help. That's been suggested by many of the commentators, it's been mentioned in decisions of this Court. If, in fact, one could use self-help to effect the removal of pickets from the premises, and thereby channel the dispute, at least as to the criminal aspects or the tort aspects of the case, into State court, it seems illogical not to allow the -- Sears in this particular circumstance -- the property owner to go into State court initially, to have that dispute resolved without the necessity of exercising self-help.

The significance or the benefit of State court, in this particular circumstance, I think is very obvious under the Act, for two reasons:

First, under the particular factual circumstances under which this case arose, there was no availability of any NLRB relief. There was sincere -- it was not challenging the objective of the picketing, merely its location; there was no way that Sears could initially obtain a forum before the Board to resolve this dispute.

But even if there were some procedure for doing that,

at best the Board might at some time find that in fact the union activity on Sears premises was not protected. Sears at that point would simply have to go into court to enforce the Board order, since the Board order is not self executing, and we would be right back to where we were, fighting it out in a court at some later time, rather than at some earlier time that at least would have the advantage of placing the issues at peace between the parties without exercising self-help.

If this proceeding, for example, had gotten back into the California State courts, or to a federal district court, to enforce a Board order, the Board --- rather, the court would not of course necessarily be bound by the NLRB decision. There might be other issues that would have to be raised, either under State law or federal law. One would hope that the court would give due deference to the Board decision; but the fact of the matter is that a determination of the Board on an unfair labor practice charge is not res judicata or collateral estoppel in a subsequent proceeding. So neither from terms of an access to a forum, nor if there were a forum, is a proceeding before the Board a remedy, an effective remedy, where the circumstances involve the location of the picketing rather than its objective.

In this ---

QUESTION: What if 30 days had gone by before Sears moved?

MR. SIEGEL: That would be fine if the sole object was organizational. Of course, at that point, the union could simply change the object of the picketing to informational picketing, and therefore there would not be an unfair labor practice.

QUESTION: I take it you don't -- do you want to pursue my question or not? Let's suppose that they were picketing for organizational purposes.

MR. SIEGEL: Solely?

QUESTION: Yes.

MR. SIEGEL: If they were picketing solely for organizational purposes, at that point in time Sears could have gone to the Board. However, --

QUESTION: Well, I know, but what if you had gone to the court, State court?

MR. SIEGEL: I submit, Your Honor, that our position would be the same. For this reason: during --

QUESTION: That's what I want to get to: why?

MR. SIEGEL: Because in the interim of time between 30 days, Sears could have exercised self-help and remove the pickets from the premises. Now, granted, that may have engendered the quicker filing of an unfair labor practice charge by the union -- although it did not do so in this case. But if that had happened, if an unfair labor practice charge had been filed, the issues as to the exercise of self-help

would still have had to have been resolved in the State court. If Sears, for example, had effected --

QUESTION: But suppose nothing had started, Sears didn't get around to doing anything until after 30 days, and then it decided that it was tired of this recognition picketing and went to the State court for an injunction, claiming that they were trespassing, and the union answered: Well, this is arguably prohibited by 8(b)(7) --

MR. SIEGEL: Your Honor, I think the circumstances would not change. In effect, --

QUESTION: So you would say we just -- you're just urging us then to go even that far in saying that even if it's arguably prohibited, or is prohibited by anybody's prediction, that the State court should be free to go ahead? Even though general counsel, in that circumstance, can go right to court and get an injunction?

MR. SIEGEL: All the more reason, Your Honor, why access to State courts should be permitted. I think it is unreasonable to assume that a State court will ignore the implications of the Act or any other principle that would be brought to its attention, either by the union or the Board, in an appropriate case.

If the State court should err in the balancing of the effectiveness of the location of the picketing, or in any other issue, ultimately the remedy of the Board would be to go

in and get an injunction against the further effectiveness of the State court injunction.

There is a remedy for the Board and the union under those circumstances. There really is no remedy for the employer, if one must await any ultimate determination of the Board.

But Your Honor's question, I think, points out the necessity of the position that we've taken in this case. In effect, when these issues reach State courts on the self-help or tort claim, and the courts are considering the defense, the activity is protected under the Act, there is in effect a determination whether the activity is actually protected, rather than merely arguably.

So, in this particular circumstance, that decision as to whether the activity is truly protected would be made at an earlier stage, which is to everybody's advantage. Again, if the State court errs, a petition could be made to modify the injunction under State law, and ultimately if the Board or the union felt that the court, the State court, was not properly deferring to some federal principle, there are remedies available right now, under the present state of the law, for going in, getting an injunction, and, on the principle of supremacy, the State court injunction would dissipate.

QUESTION: Mr. Siegel, help me out a little bit. Sears asked the pickets to leave the premises.

MR. SIEGEL: That's correct.

QUESTION: At that time, was the union in a position to file an unfair labor practice claim under 8(a)(1)?

MR. SIEGEL: I would suggest, Your Honor, that if they felt that they truly were engaging in activity which was protected or arguably protected, yes, they could have.

QUESTION: Would Sears then be satisfied if we had a rule -- let me put it another way: Would Sears feel adequately protected if we held that the union could not claim preemption unless it had filed an unfair labor practice claim?

MR. SIEGEL: That effectively is the alternative suggested by the union after the long discussion on the basic preemption doctrine.

QUESTION: Would you be satisfied with it?

MR. SIEGEL: No, I would not, Your Honor, because under the current state of the law, where you exercise self-help, the burden of a delay in obtaining a Board decision is already with the union. So, allowing this dispute to be resolved in a civil proceeding doesn't shift the burden of a delay any more than it is under current law. It makes it a more peaceable forum, but it doesn't shift the burden of delay.

And, as I mentioned before, even if the Board decided in Sears' favor in this particular case and refused to issue a complaint, that wouldn't resolve the underlying issue. Sears would still have to go into court at that point and obtain some type of injunctive or other relief, as to which

the Board --

QUESTION: Unless it wanted to exercise self-help.

MR. SIEGEL: Unless it wanted to exercise self-help. Which it could do from the very beginning.

QUESTION: Yes. And why haven't you? And why didn't Sears protect itself that way?

MR. SIEGEL: Well, I --

QUESTION: Against a threat of violence or something?

MR. SIEGEL: I would submit, Your Honor, that it would be unwise policy to encourage violence, and that is why we tried to get this dispute into some form to resolve it without the physical force that would be involved in self-help.

QUESTION: Well, when you ordered them off the premises, wasn't that a first step in self-help?

MR. SIEGEL: Yes, it was. Although I wouldn't characterize it as an order, it was a request; ultimately, in fact, the invitation to go to court might be said to have been the union's, because they said they would not get off without legal process.

Well, at that point in time, self-help is not legal process in the sense of any kind of judicial or administrative proceeding, we couldn't go to the Board, we had to go to State court.

I submit that the policy should be, since there is already these kinds of issues being resolved in State proceedings

of various kinds, the policy should be to encourage the dispute into a neutral forum, into a forum that will be able to hear the issues and decide the issues, and as to which the burden of delay in the resolution in the State court is already with the union, it's simply an alternative between self-help and a peaceable resolution.

QUESTION: Well, I suppose if the union were arguing that just an order to get off was not an adequate premise for filing a charge, that when you went to court would add something substantial to that action, I suppose.

MR. SIEGEL: Well, I believe --

QUESTION: At least then the union -- that the union's right to file, if it had one, should mature.

MR. SIEGEL: I believe it would have existed at both stages, Your Honor; but most certainly I would not dispute that they could have chosen to file a charge, if they wanted to. The fact that they did not do so is discussed in the trial court record, and may have been one of the factors that the court considered in determining whether, in fact, the location to which the court ultimately limited the picketing would be an effective one, or whether the union really believed that it was engaging in protected activity. We do not know that, but it is discussed in the Superior Court record.

If, in fact, we had a rule in this situation, where, in response to Justice White's question, Sears had to wait

until the Board resolved the issue -- which I've indicated would not truly protect Sears' right. In effect, we are condoning what may be improper conduct by the union and leaving the property owner without a remedy, it seems that it would be more effective to channel it into the forum of the State court.

Now, it's interesting to note that all of the briefs in this case, including the brief of the Board, do concede, I believe, that trespass, the regulation of trespass is a valid State interest, a very -- one deeply rooted in State interest.

So I submit that under Garmon, under one of the exceptions that the Court announced, that the fact that trespass has historically been a matter of deep State interest, every State has laws concerning trespass, is a valid ground for invoking the jurisdiction of the court.

QUESTION: It used to be that the Board had no declaratory judgment procedure, like some agencies, does it have any now?

MR. SIEGEL: Only in jurisdictional questions, Your Honor, and rarely exercised. But again, even if it did have declaratory --

QUESTION: But my question is: Does it have it?

MR. SIEGEL: No, it does not, Your Honor.

Even if it did, we go back to the problem I mentioned earlier, that --

QUESTION: I understand that.

MR. SIEGEL: Okay. I think I will --

QUESTION: If it did, it would take so long it wouldn't do much good. Am I right?

MR. SIEGEL: I believe that is true, Your Honor, but still would not be self-executing. And that is the essential problem here.

QUESTION: Mr. Siegel, may I ask a factual question? Did the union represent any Sears employees?

MR. SIEGEL: None whatsoever, Your Honor.

I will reserve the rest of my time.

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

Mr. Williams.

ORAL ARGUMENT OF JERRY J. WILLIAMS, ESQ.,

ON BEHALF OF THE RESPONDENT

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

I will start, if I may, by responding to some of the contentions made by counsel for the Petitioner, with which we are in dispute.

There's nothing in the record, for example, to show that the Superior Court believed that the Sears affidavits were correct, and that the union affidavits were incorrect; that kind of determination wasn't made. As a matter of fact, I was unaware until after the ruling had been made that any affidavits had been filed to the fact that anyone had

interrupted deliveries -- assuming that that was a union objective, in the course of the picketing -- in the relocated areas.

QUESTION: What order did the court issue on those affidavits?

MR. WILLIAMS: Well, there is a temporary restraining order, which was issued, as I recollect, ex parte. We had a junior member of the firm going down on the matter, because it seemed so simplistic in nature.

Then there was a preliminary injunction after hearing, then there was demurrer on the basis of the court's jurisdiction. And we had two different Superior Court judges involved in those proceedings, which were unduly prolix and rather prolonged. The union, sua sponte, discontinued the picketing as being totally ineffectual, after the court had ordered that the pickets be relocated to the outlying areas. I think the briefs and the Appendix show that there is a great distance from the sidewalks around Sears store to the actual so-called public sidewalk -- if that's an appropriate term in this context.

So that the cars would go shooting in and out from the public street to the parking areas, which were, in all respects, identical to any other area of Chula Vista, which was in fact public. Some of them perhaps just going to the red-white-and-blue mailbox in the so-called private area of

the Sears sidewalk, which was the sidewalk around the store.

I had no idea that there had been any interruption of deliveries until I read the affidavits, after the order had been issued.

QUESTION: Well, isn't it a reasonable assumption that the judge believed them, or he wouldn't have signed the order?

MR. WILLIAMS: No, I think, Your Honor, what the judge believed -- and I think he was demonstrably incorrect in this regard, as evidenced by the finding of the California Supreme Court and also cases later cited -- that Section 552.1 of the California Penal Code required that he issue an injunction on the theory that the union was trespassing on property other than posted industrial property.

The California Supreme Court decisions of In Re Zerbe and in Schwartz-Torrance Investment Corporation vs. Bakers Union, dealing with shopping center type situations, and also in providing an interpretative judicial gloss to 552.1, make clear that those exceptions on behalf of labor organizations apply not only to posted industrial property, but, a fortiori, as the Court has itself reasoned -- I'm speaking of the California Supreme Court -- as the Court has itself reasoned, if it applies an exception in favor of labor organization picketing to the general trespass statute, Section 602 of the California Penal Code, to posted industrial property, a fortiori, that exception applies to property other

than posted industrial property. That was the mistake that the court made.

As I said, the case started out --

QUESTION: Was this urged upon him in the -- upon the Superior Court judge in San Diego County, in the hearing before the preliminary injunction was issued? Were these decisions of the Supreme Court of California called to his attention?

MR. WILLIAMS: The In Re Berbs case was. I have no independent recollection as to whether the Schwartz-Torrance case was. It is my recollection, however, my best guess, that it was.

QUESTION: So isn't it reasonable to assume that he would have followed the decision of the Supreme Court of California that you contend is right on point?

MR. WILLIAMS: No, Your Honor. I wish that had been the case. We wouldn't be here now.

What happened, as the Appendix, I think, clearly indicates in those portions of the transcript which are cited by counsel for the Petitioner, the Supreme Court judge said, in effect: "Boy, I really hate to issue this injunction, you know, it seems wrong to me. But this isn't posted industrial property, and under 552.1 the exemption for labor organization trespass for picketing apparently applies only to posted industrial property."

He's clearly wrong in that. But --

QUESTION: Well, we can't review that sort of a point here, can we, as to what the California lawwas on the subject?

MR. WILLIAMS: Well, the question was asked -- I was responding to a question from the Chief Justice. Yes, I think we quite clearly have raised the question of an independent State ground as a basis for the decision --

QUESTION: Well, as I understood the opinion of the Supreme Court of California, it falls a little bit into the mold of the human cannonball case that my brother White wrote for us last term. That is, that --

QUESTION: And that Justice Rehnquist was so enthusiastic about.

[Laughter.]

QUESTION: I joined you.

MR. WILLIAMS: And I haven't read.

QUESTION: I know.

QUESTION: But where it appears that the State court may feel itself bound to reach a particular conclusion as a result of a principle of federal law, this Court will decide the principle of federal law and send it back, so that the State court will -- if the federal law does not preclude the State court from reaching its own result on its own law, the State court is then free to do that.

MR. WILLIAMS: Well, I think perhaps -- if this is responsive, Your Honor -- the short answer is that the trial judge made a mistake, and the record clearly shows that. The Appendix which is before this Court clearly shows that. The law of the State of California quite clearly, in Schwartz-Torrance Investment Corporation, places an interpretative gloss on 552.1, and we believe this --

QUESTION: Well, why didn't the Supreme Court of California reverse on that basis?

MR. WILLIAMS: I've asked myself that question.

QUESTION: They didn't did they?

MR. WILLIAMS: No, they did not. They seemed determined to raise the specific question: whether or not the Gazmon doctrine, as recently restated in the Farmer and Hill case -- the Hill case which became the Farmer case; and now perhaps the Farmer-Hill case -- whether or not the doctrine of federal preemption or the supremacy clause of the United States Constitution applied to trespassory picketing, a question specifically reserved in the Fairlawn case, contrary again to the assertion of counsel that it is uniformly conceded that this is an interest deeply rooted in local feeling.

Certainly, as an interest deeply rooted in local feeling in California, which has both a line of cases saying that labor unions may trespass -- to use that word advisedly -- on private property, and also,has most recently enacted a

statute after the submission of briefs to the California Supreme Court -- 527.3 of the California Code of Civil Procedure -- to further illuminate the judicial gloss placed on 552.1, to wit, the labor organizations may trespass for labor organizational purposes and that no preliminary injunctions may be issued to stop them.

QUESTION: Well, all of those grounds would remain open for the California Court's decision if we were to reverse on the federal ground here, would they not?

MR. WILLIAMS: I'm not sure I can answer that in the manner which it is posed, Your Honor, for this reason: As I understand it, one of the questions which is raised by Petitioner is whether or not trespassory picketing is in fact deeply rooted in local feeling. California says it is not. The issue was reserved in Fairlawn.

We're talking here about arguably protected activity under Section 7 of the amended Labor Management Relations Act.

QUESTION: Well, then, you suggest that the preemption doctrine will vary from State to State, depending on how deeply rooted the trespass feeling appears from an examination of State statutes?

MR. WILLIAMS: On the contrary, Your Honor, I'm suggesting that in a line of decisions starting with Garmon II, at least, in 1959, you reiterated most recently in the Farmer-Hill case, if I may use that terminology, last term, the Court

has been unanimous on the point that where we're talking about arguably protected activities, here peaceful picketing, concededly peaceful picketing, that the activity is preempted and that the NLRB's jurisdiction is exclusive; or, as the Court has itself said, the NLRB may not have the last one, but they must have the first.

QUESTION: Well then, what has the deeply rooted State feeling got to do with it at all, that you mentioned a moment ago?

MR. WILLIAMS: The point had been made by Petitioner, Your Honor, that everybody knows or everybody concedes -- which I take issue with -- that this is an area deeply rooted in State feeling and that areas deeply rooted in State feeling are exemptions to the Garmon doctrine of federal preemption.

Everybody does not know that. I do not know that. The State of California does not know that. That is the point that I was making.

QUESTION: Well, so then your response to Petitioner would be: even if he's right, it would go from a -- on a State-to-State basis?

MR. WILLIAMS: No, Your Honor. I'm saying this, I'm saying that from Garmon II to Farmer-Hill, even though in Garmon II there were -- Justice Harlan wrote a concurring opinion on the point of arguably protected activity, in contradistinction to arguably prohibited activity. The Court was

unanimous in holding that as to arguably protected activity under Section 7 and, in this case, Section 13, the Board's jurisdiction is exclusive and State courts must yield.

QUESTION: Could the union have gone to the Board as soon as they were requested or ordered to leave the premises and terminate the trespass, the alleged trespass?

MR. WILLIAMS: Frankly, Your Honor, I did not know that in 1973. I discovered it from reading the Board's amicus brief, that that is the Board's position, that from the moment that the employer orders the union off the premises that gives rise to an arguable 8(a)(1), thereby providing a forum for the employer, which has been apparently a concern of the Petitioner in this case, providing a forum for the employer to determine whether the picketing was trespassory in nature or whether it was protected under Section 7 of --

QUESTION: But only if the union filed.

MR. WILLIAMS: Yes. Yes, Your Honor. If the 8(a)(1) were filed.

However, I might add, in response to a question asked earlier by Your Honor, that with regard to the 30-day rule, had that occurred, of course, that would give immediate rise to an 8(b)(7) petition and a consequent 10(l) injunction under the Board's jurisdiction to apply in federal court for a Section 10(l) injunction; and those injunctions --

QUESTION: That's after 30 days?

MR. WILLIAMS: Yes, Your Honor. That was the question as I recall it, in post.

QUESTION: If, in your view and belief at the time, there was no basis for going to the Board when you were ordered off the premises, did you have a basis for going to the Board when Sears went to the State court?

MR. WILLIAMS: When Sears obtained an injunction, Your Honor?

QUESTION: Yes.

MR. WILLIAMS: I would suppose, as I now understand the Board's position, that an 8(a)(1) injunction -- I'm sorry, an 8(a)(1) unfair labor practice charge would be entertained by the Region on the basis of any action to interfere with the Section 7 rights of the picketers.

That we did not understand at the time that the case -- as a matter of fact, as I say, we thought it was a very simple matter, since the State law was so clear.

QUESTION: You answered my brother White that only if the union had filed -- had gone to the Board. At page 17 of its amicus brief, the Board says "since the union's activity here was arguably prohibited, Sears could have filed the charge".

MR. WILLIAMS: Yes, Your Honor. I recall that portion of the brief. Sears did not file a charge, as the Board says it would equally --

QUESTION: But you answered my brother White: Only if the union filed a charge.

MR. WILLIAMS: Yes, that was the question --

QUESTION: The Board's position is that Sears could have filed the charge.

MR. WILLIAMS: Yes, Your Honor.

The Board's position is that we were both remiss in not filing charges.

QUESTION: Well now, what would have been the basis for the employer to file a charge within the -- prior to the end of 30 days?

MR. WILLIAMS: The Board suggested that a charge could be filed under 8(b)(2) in that we're trying to coerce the employer into discharging employees in favor of union adherents. The Board suggested several other bases on which Section 8(b) unfair labor practices could have been filed. Outlined, I believe, at page 17 of that petition.

QUESTION: But that would have had very little to do with where they're picketing.

MR. WILLIAMS: With the location of the picketing, Your Honor?

It might, depending on what charge was filed and what action the Board sought to take.

QUESTION: Mr. Williams, could you help me on the theory of the union's 8(a)(1) charge, which someone suggests

could have been filed? If the union didn't represent any employees, how could they have filed an 8(a)(1) charge?

MR. WILLIAMS: On the theory that the Section 7 rights of the union adherents, the picketers, were being invaded.

As I understand it, everyone has Section 7 rights, employees and non-employees organizers. Harking back to Babcock & Wilcox, also Republic Aviation and others, that line of cases.

QUESTION: Is that settled? I'm just --

MR. WILLIAMS: Yes.

QUESTION: -- having to confess my ignorance on it.

MR. WILLIAMS: Yes, for --

QUESTION: Because the statutory language speaks of employees, and I didn't realize that it clearly applied to others.

MR. WILLIAMS: Yes. As I say, the Board takes the position that both the Petitioner and the Respondent were equally remiss in not filing charges under these circumstances.

Of course, it has never been a part of the Garmon doctrine or the doctrine of federal preemption under the supremacy clause that the filing of a charge was a condition precedent to the exercise of arguably protected, in contra-distinction to arguably prohibited, activities.

Also, under the circumstances of this case, since we

were dealing with arguably protected activities, which were nullified by the effect of the preliminary injunction, it would seem clear that this was a matter which fell within the line of cases originating with Gaxmon I in 1953, I believe. And recently expressed by this Court in the Farmer-Hill decision.

You know, another point that has been made or urged is that, well, after all, it's much more expedious for an attorney representing an employer to go to Superior Court and get an injunction. Well, that's true, it certainly is, but the vice of that is that the injunction is almost invariably dispositive. The terms "temporary injunction" or "preliminary injunction" are misnomers. That, of course, was a point made years ago by Justice Frankfurter and Mr. Green in the labor injunction which led to the Norris-LaGuardia Act. We had no similar such statute in California until the recent passage of the statute adverted to in our brief, CCP Section 527.3, pointing out that the so-called preliminary injunction is anything but preliminary. Or, as was said to me when I was going to law school, there is nothing more permanent than a temporary building.

If I may, then, to resume the order of my argument, I should like to point out to the Court that what we are talking about here are arguably protected activities. The activities are undisputed -- is beyond dispute, and, I think,

conceded by counsel. We're talking about peaceful picketing on walkways generally open to the public. There was a U.S. Mail box, a big red-white-and-blue mailbox, in the area denominated by Petitioner as private. There was no obstruction of traffic whatsoever at any time.

QUESTION: Does that make it public, because they put a mailbox there?

MR. WILLIAMS: Well, I -- it seems to me, Your Honor, that the term "private property" raises a tautology, when we're talking about Section 7 rights.

QUESTION: How about a hotel? A hotel has a mailbox inside of it.

MR. WILLIAMS: A red-white-and-blue mailbox, U. S. Mail box?

QUESTION: I don't know what colors they are, but it's a mailbox inside the hotel.

MR. WILLIAMS: There may be a mail slot, Your Honor, one of those brass things with a slot in it, yes, in a hotel.

QUESTION: What's the difference?

MR. WILLIAMS: Well, the difference is that a big red-white-and-blue mailbox mounted, anchored to the curb of the sidewalk, is an invitation to all comers to come on the premises. And to say under those circumstances that the property is private, --

QUESTION: Well, it's an invitation to come on the

premises to mail a letter, perhaps.

MR. WILLIAMS: Well, maybe some of the pickets wished to do so.

[Laughter.]

QUESTION: Is that shown in the record here? To claim that that was the case.

MR. WILLIAMS: The red-white-and-blue mailbox is part of the Appendix picture D.

QUESTION: Yes, well, I know what they are.

MR. WILLIAMS: It came out very poorly in the Polaroid. I wish I could do something about that.

I think the fact that there was a red-white-and-blue mailbox anchored to the sidewalk denominated by the Petitioner as --

QUESTION: Well, to put it another way: would it have been any different if it was green?

[Laughter.]

MR. WILLIAMS: It wouldn't have been a mailbox then, Your Honor, and I don't think it was --

QUESTION: Why not? It used to be green.

MR. WILLIAMS: Well, if it were green, then we'd be back to prior to Gaymon, and I think we'd be in serious trouble.

[Laughter.]

QUESTION: Well, would you outline what difference

it makes to your case whether there was or was not any mailbox there?

MR. WILLIAMS: Just this, Your Honor: I think it's a tautology to talk about Section 7 rights versus private property rights, because it's a truism in jurisprudence that in the true sense when we talk about private property we're talking about the right to exclude others.

And what we're talking about here is under what circumstances do individuals, be they union adherents, employees of the employer or otherwise, have the right of access; and to use -- I know the term "private property" is sacrosanct in English common law and that it has been carried over to the United States, but,no matter how metaphysically we treat it, property has no rights.

So we're talking here about rights of access of individuals, be they union adherents or otherwise, in a situation of peaceful picketing which is arguably protected, admittedly peaceful picketing, under Sections 7 and 13 of the Act.

QUESTION: Well, Mr. Williams, I take it the trial court didn't agree with you on California law.

MR. WILLIAMS: I think the trial court was confused, and I think the record indicates that.

QUESTION: Well, so the -- well, anyway, the answer is he didn't agree with you?

MR. WILLIAMS: I don't -- I do not think that --

QUESTION: Did you ever present the claim under California law to him?

MR. WILLIAMS: I did not personally, I did not argue the --

QUESTION: Nor did the union?

MR. WILLIAMS: Beg pardon? Yes, yes, Your Honor, I see what you mean.

QUESTION: Well, did the union say that it was contrary to California law to issue the injunction, or didn't they?

MR. WILLIAMS: Yes.

QUESTION: Did it present that claim to the district Court of Appeals?

MR. WILLIAMS: Yes.

QUESTION: And to the Supreme Court?

MR. WILLIAMS: Yes.

QUESTION: And neither court reached it?

MR. WILLIAMS: The Supreme Court of the State of California decided the case, of course, on the basis of --

QUESTION: How about the district Court of Appeals?

MR. WILLIAMS: The district Court of Appeals distinguished the Schwartz-Torrance and the other cases.

QUESTION: And so it disagreed with you -- with the union also on the California law?

MR. WILLIAMS: Yes, that is correct.

QUESTION: But you say you're correct?

MR. WILLIAMS: I say that the California Supreme Court is correct, in holding that under State law there is a proper basis for allowing the so-called trespassory picketing. They did not chose that --

QUESTION: But it didn't hold that in this case.

MR. WILLIAMS: No, they have -- they have held it, though, in --

QUESTION: And it didn't say whether the district Court of Appeals was correct in distinguishing the prior cases?

MR. WILLIAMS: No, they did an interesting thing. The first time they assumed jurisdiction, they --

QUESTION: Well, they didn't say the district court was wrong, did they?

MR. WILLIAMS: In effect they did, they remanded to the district court with instructions to view the case in light of Musicians' Local 6 vs. Oakland Stadium, in which those kinds of issues were raised. The district Court of Appeals made a second decision in which they chose not to follow that direction, and that second -- the second time the California Supreme Court asserted jurisdiction they decided it exclusively on the basis of the federal preemption issue.

QUESTION: But never did say the district court was wrong on the California law?

MR. WILLIAMS: No. No, Your Honor.

QUESTION: Mr. Williams, you started out by pointing out that either the record was unclear, there was no finding as to whether the picketing had any effect on interrupting deliveries. What difference does that make? Don't we have to assume that the picketing is for some reason, either to interfere with the patronage of the store or to interfere with deliveries?

MR. WILLIAMS: Oh, surely, Your Honor.

QUESTION: Oh, so that -- all right.

I don't know what point you were making, that's what I didn't quite get.

MR. WILLIAMS: The point I was contesting the observation of the petitioner that the court believed the employer --

QUESTION: Well, shouldn't we assume, for the purpose of decision, that he did?

MR. WILLIAMS: Yes.

QUESTION: Wouldn't that be better?

MR. WILLIAMS: Yes.

May I continue?

MR. CHIEF JUSTICE BURGER: Very well.

MR. WILLIAMS: I think also there has been an equation made between trespass and other kinds of tortuous activity, which this Court has found to be exceptions to the Carmen doctrine. Now, in each one of those cases, such as

Linn vs. Plant Guards, dealing with malicious libel, or the Farmer-Hill case, dealing with outrageous infliction of emotional distress, or even Youngdahl vs. Fainfair, dealing with violent picketing; we've dealt with outrageous, particularly outrageous conduct, you might even say unconscionable conduct. And even there the Court has been careful to distinguish between the unconscionable conduct and the conduct which is protected, as in Youngdahl, for example, which says that the violence is certainly subject to the police power of the State, but not the right to picket itself.

In sum, on that aspect of our case, Your Honor, contrary to the contentions of the Petitioner, the exclusive jurisdiction of the National Labor Relations Board's undergarment is not displaced by the mere incantation of the phrase "violence, libel, tortuous infliction of emotional distress or trespass". In other words, there is no such equation that has been made, and that particular blunderbuss approach has been studiously avoided by this Court in a line of decisions as recently as the Farmer case.

I should also like to point out, Your Honor, that with regard to the reply brief, I had hoped that the Court would regard it as untimely, since it apparently does not comply with the time requirements of Rule 41, but since that apparently has not occurred, I have hastily reviewed that brief and I find that there is, at page 9 thereof, a misstate-

ment of the law. The last sentence of the first paragraph, "arguably protected" has been the preemption rule, not "actually protected".

Also the two cases cited, City and County of --

QUESTION: Say that again, will you? On the top of page 9.

MR. WILLIAMS: Yes, Your Honor. At the top of page --

QUESTION: I see the sentence to which you're referring. "This Court has consistently recognized, in effect," --

MR. WILLIAMS: Yes. "This Court has consistently recognized, in effect, that, even though conduct is 'arguably' protected, it may nevertheless not be preempted absent a determination that it is actually protected."

Well, with all due respect, Your Honor, for the concurring opinion in the Adriadne case, such has not been the Garmon doctrine rule. The two cases which are cited are inapposite at page 11, one deals with a public employee strike, the other deals with violence and mass picketing; neither deal with the interpretation of 527.3 appropriate here.

That, Your Honor, concludes my presentation.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Do you have anything further, Mr. Siegel?

REBUTTAL ARGUMENT OF H. WARREN SIEGEL, ESQ.,

ON BEHALF OF THE PETITIONER

MR. SIEGEL: Yes, Your Honor.

In response to the question that I believe was asked by Mr. Justice White, the problem with the proposal of the Board that Sears file a charge under 8(b) is, of course, as I believe I mentioned earlier, that that goes only to the objective, it does not deal at all with the location.

But even in this case, if the Board had found some impermissible objective, the union could simply have changed that objective to a valid one, and we'd be right back where we started now.

It is interesting to note that both the Board and the union have conceded in the briefs that there are some trespass situations which are already subject to injunction under State law. They give the example of the Marshall Field case, where you actually had people coming into the physical confines of the store. Having made that concession, that the State would have jurisdiction there, I assume that must be on the basis that there's already a Board decision that that activity is actually not protected, therefore it's not a very far jump to allowing the Court to determine that same thing in the context of a preliminary injunction. For the very reasons I mentioned earlier: that whenever a court, either a State or federal, ultimately resolves those issues, in effect

they are deciding whether there is actual protection, not merely arguable protection, and many times, of course, do disagree with the Board as to that concept.

I don't want to make this argument too lengthy by arguing State law, because I do believe that that -- the California Supreme Court had an opportunity to resolve the issues of State law raised by the union. As a matter of fact, the statute to which they refer became effective January 1, '76; this case was argued, if my memory serves me correctly, before the California Supreme Court in April of '76. The California Supreme Court decision was in September of '76.

If the Court had felt compelled by any of the arguments under State law that are raised now by the union, it's to be assumed they would have resolved them. Not having done so, apparently there was agreement with the Court of Appeals in this case that California State law did not preclude the issues of the injunction, and, in fact, we have cited two Courts of Appeals decisions in California, interpreting the new statute, while although they deal with somewhat factually different situations, in construing the intent of the law, the new law, say it was not intended to change pre-existing law.

There still must be a determination, for example, whether the pickets have a right to lawfully be at the location at which they --

QUESTION: Did the union present the State law question to the State Supreme Court?

MR. SIEGEL: Not the next statute, Your Honor.

QUESTION: But the one the Court of appeals decided?

MR. SIEGEL: Yes.

In any case, both of those California Court of Appeals' decisions which indicate that the new law does not change the pre-existing law were denied hearings by the California Supreme Court, which, in California, is equivalent to a decision on the merits, not necessarily agreeing with the reasoning of the Court but with the decision, and citable as precedent.

QUESTION: Well, that seems to prevent injunctions where the union is entitled to be where it is.

MR. SIEGEL: Where it may lawfully be, and therefore still leaves open the entire issues presented in this case: can they lawfully be where we say they couldn't lawfully be? Correct.

QUESTION: Do you think your situation, in terms of the trespass, is any different from hotel workers lobbying in the -- picketing in the lobby of the hotel because there's a mailbox there?

MR. SIEGEL: I don't think the mailbox situation has anything to do with this case at all. I had the impression that we were perhaps re-arguing Central Hardware and those

cases during the argument of that issue.

Certainly it's not any more --

QUESTION: I wondered why counsel was resting so much on the mailbox.

MR. SIEGEL: I don't know. The post office requested Sears' permission to put it there, according to the record, and Sears said yes. There is -- if that situation doesn't prevent the union from requesting permission, at least conceivably, I doubt it, but conceivably getting permission; but the point of the matter is even the post office recognized Sears property right to that location by requesting permission to put it there, and Sears did consent.

I see my time is up, and I really have nothing further to add.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 12:00 noon, the case in the above-entitled matter was submitted.]

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