In the

Supreme Court of the United States

NEW YORK TELEPHONE COMPANY, et al.,

Petitioners,

v.

NEW YORK STATE DEPARTMENT OF LABOR, et al.,

Respondents.

No. 77-961

Washington, D.C.
October 30, 1978

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Washington, D. C.
Monday, October 30, 1978

The above-entitled matter came on for argument at 10:03 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM BRENNAN, 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:

DAVID L. BENETAR, ESQ., Benetar & Einhorn, 469 Fifth Avenue, New York, New York 10017, on behalf of the Petitioners.

MARIA LENHOFF MARCUS, ESQ., Special Assistant Attorney General, State of New York, Two World Trade Center, New York, New York 10047, on behalf of the Respondents.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in 961, New York Telephone Company against the New York State Department of Labor.

Mr. Benetar, you may proceed.

ORAL ARGUMENT OF DAVID L. BENETAR, ESQ.,

ON BEHALF OF THE PETITIONERS

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

This case brings up for review a judgment of the Court of Appeals for the Second Circuit reversing United States District Court for the Southern District judgment after a trial, a nine-day trial, holding that New York State statute granting unemployment compensation to strikers was unconstitutional. The reversal reinstated the statute.

Under the statute, payments are made to strikers after seven weeks waiting period, plus the one week required of all claimants for compensation. The cost of unemployment insurance, or compensation, is borne by the employer against whom the strike is called.

After the trial, the District Court -- and I'll briefly, very briefly, sketch the outstanding holdings, or findings, of the District Court -- the statute, he held, was in direct and substantial conflict with the national policy of neutrality on the part of the Government insofar as economic

contests are concerned in the field of collective bargaining. He held that the state intervention on behalf of strikers was causing employers to finance strikes against themselves. Therefore, he held that the law was preempted by the National Labor Relations Act, as amended, under the Supremacy Clause of the Constitution.

The substantial impact of New York's law on bargaining and strikes was evidenced -- if, indeed, it isn't self-evident -- by documentary proof emanating in considerable measure from involved unions, those involved in this strike and major unions, generally, in the country. From economic data, from expert opinion and from employers' views and perhaps most concretely, it was evidenced from the fact that $49 million dollars in unemployment compensation was paid out in the course of the particular strike which led up to this lawsuit.

Now, the Second Circuit accepted the findings of the District Court. They acknowledged the conflict which the District Court found between the national policy of neutrality and the state statute in question. Nevertheless, although they said in their words "that a positive expression of congressional intent is lacking," nevertheless they said, "We will reverse because by resorting to inference we find that Congress intended to tolerate this conflict" and that they saw this whole area of payment to strikers as one inviting to state experimentation on a state by state basis.

Uncertain and ambiguous legislative history, which we contend is all there is in this case, falls far short of the standard of clarity that is required to justify an invasion of the neutrality principle.

QUESTION: Mr. Benetar, would your position be the same if this were unemployment benefits for a lockout that was called by the employer?

MR. BENETAR: I think that on principle the position would have to be the same. But in the case of a lockout, I am not aware of the same kind of statistics concerning impact, concerning frequency, for example. Strikes and lockouts are just not comparable in numbers. So I would want to look into that question because we, in this case, developed impact very thoroughly. But, on principle, as I said at the opening of my answer, I think they would both have to be controlled by the same considerations.

QUESTION: Would you think the same would be true of welfare payments which are financed by the taxpayers, generally, rather than the employer?

MR. BENETAR: No, I would not, sir. I would not. I see welfare --

QUESTION: How does it differ in its impact on the neutrality principle that you were discussing?

MR. BENETAR: In a few ways. And what happened in this case sort of dramatizes the difference, because there were

33,000 workers who collected unemployment compensation and 1,000 who applied for welfare. Now, the difference that I see -- The differences are manifold. Number one, unemployment insurance is fixed, certain and promised. You know that it is coming after a certain number of weeks. You know the amount. Number two, there is no needs test, because unemployment compensation wasn't intended, in its origins -- Congress wasn't thinking in its origins about needs, except those created by the great depression when people were looking for work and couldn't find it. So, there is no needs test.

And, finally, if the Court pleases, welfare is not subsidized, paid for by the very employer against whom the strike is being called and maintained.

QUESTION: How do you distinguish its impact on the neutrality principle?

MR. BENETAR: Well, in our case, as Your Honor can see from the figures, the impacts of welfare and unemployment insurance were nowhere nearly equal. Unemployment compensation far outweighed the impact of welfare.

I think there is another aspect of this and that is that in the case of welfare one would have to consider, perhaps, and weigh the interests of the state, if it was out and out trying to protect welfare, not under the guise of unemployment insurance. But I do not see, and I have never seen any proof, to indicate impact to the extent that I have described to the

Court in these few opening sentences. If there were such proof, perhaps, the situation might be changed, but as far as I know and as far as I read the situation, they do stand on a different footing.

QUESTION: Mr. Benetar, if you distinguish welfare, what would you do if you had unemployment compensation financed by the state, $49 million paid by the state instead of the employer? If it was financed by the state from general revenues, rather than by the employer, would your case be different?

MR. BENETAR: It would be different, but not in any way basically altered. It would be different because the direct subsidy by the employer involved, of course, underscores and emphasizes the extent of the invasion of the principle of neutrality. You are not only helping the striker but you are putting the burden of it on the man against whom the strike is being called.

So, in my judgment, if the only thing that were present were the pay out of $49 million, I would still say that under an unemployment compensation statute this was an unlawful and preemptive statute and that the payment should not be made.

Now, in a way, I have said in my answers what I am about to say now, but I think it is important. This case touches on the core of our national policy. This is no glancing blow. It goes to the core of our national policy of

neutrality, a policy of leaving the resolution of economic disputes to the free play of economic forces. Congress enacted this comprehensive policy because, as this Court has said, because of the perceived inadequacy of the states to create a comprehensive and equitable way of dealing with the adjustment between parties to labor disputes. That was the genesis of this, to get a Federal law that would wipe out the state differences -- and they were wide and varied -- and make this principle of neutrality a principle across the land.

Now, as we see the precise question here, then, it is: Can Congress reasonably be said to have intended by the Social Security Act to invite the states to reenter, through the vehicle of unemployment compensation, the field that Congress had just preempted five or six weeks before in the National Labor Relations Act? That is the time relationship between the two acts. And did they intend then, within five or six weeks, to invite the states to reenter this preempted territory and substitute there several concepts of neutrality and of the balance of economic forces or power in place of the balance struck by Congress?

That is what we see as the question in the case and we think, to a very considerable extent, it answers itself.

QUESTION: Tell me one thing. What is the fundamental change between '35 and now? There is no change, at all, is there?

MR. BENETAR: Between 1935 and now?

QUESTION: Yes, sir.

MR. BENETAR: Yes, in the New York law, do you mean?

QUESTION: No, sir, in the whole factual situation. It is just that there is more money involved, but the relationship between New York and the labor market and the Federal Government and the labor market is the same as it was in '35, is it not?

MR. BENETAR: Well, not entirely, because in '35, as Your Honor remembers, we were in a deep depression.

QUESTION: Well, what is this we are in now?

MR. BENETAR: Well, the President has characterized it otherwise, and I think that all of us feel that regardless of the ontoward events that have been happening to us, this is not a deep --

QUESTION: Well, I am not selling apples, yet.

MR. BENETAR: No. And the threat isn't imminent, for any --

QUESTION: I mean, seriously, the relationship -- This whole point was considered in '35, and was understood --

MR. BENETAR: No, sir. With all deference, I would answer you --

QUESTION: It wasn't understood that the management would pick up this bill?

MR. BENETAR: No, sir.

QUESTION: That wasn't understood in '35?

MR. BENETAR: No, sir. No.

QUESTION: Well, what was understood in '35?

MR. BENETAR: In 1935, there was no experience rating under the New York law. In fact, if Your Honor pleases, payouts under the New York law weren't made for a year or two after 1935. So nobody knew what the extent of the payments would be.

QUESTION: All right, so '36.

MR. BENETAR: Or '37. But the question of imposing the costs on the employer --

QUESTION: Was what year?

MR. BENETAR: -- was at least 10 years later and maybe more.

QUESTION: And it has been that way ever since?

MR. BENETAR: It has been that way ever since.

QUESTION: And Congress has known it?

MR. BENETAR: Well, Congress has known it --

QUESTION: Well, have you bothered to let Congress know it?

MR. BENETAR: I haven't.

QUESTION: Has your client?

MR. BENETAR: I am not aware that they have done so, because we are of the belief that this doesn't require any further congressional action. We don't think that Congress

ever conceived of the kind of situation we are presenting to this Court today, in terms of payout, in terms of double violation of the neutrality concept. I don't think Congress had the remotest notion of it in 1935.

QUESTION: In your view, Mr. Benetar, what could Congress do about a statute of the State of New York?

MR. BENETAR: What should it do?

QUESTION: What could it do? What could be the scope of its power if it did not like what New York State has provided?

MR. BENETAR: I think that the Congress would have the right to change the concept of neutrality, but I don't think that they could or would do that without measuring the effect of so drastic an invasion of the forbidden area, on the one hand, with the desire, if there was one, on New York's part, to keep using unemployment compensation as the vehicle for paying out money not on a basis of need. I just don't think that it would happen that way.

A few words about the strike that led to this. Before it was over -- or I should say this, that on July 14, 1971, the CWA, called a nationwide strike against the Bell System companies who were bargaining with it at that time, including these Petitioners. Four days later, an agreement was reached, the union recommended it to the members, urged ratification and it was ratified on the national basis, except

in New York where it was turned down and New York went on strike. Ultimately, the national union sort of joined the strike in the sense that the New York authorities insisted on conducting it so the national union went along with it. Before the strike was over in New York, seven months had elapsed, $49 million were paid out to some 33,000 strikers and the unemployment insurance account of Telephone Company alone was depleted by $40 million, which it was required to replace and is in the process of replacing.

The employers were influenced to settle against their better judgment. This was all in the contracts which were accepted on terms in New York which broke the national pattern. They didn't want to do that, but they felt the strikers had several more weeks, if not months, of unemployment compensation coming and there just wasn't any use carrying the fight any longer.

Contrasted with the $49 million paid out by the companies by the vehicle of unemployment compensation, was $14 million paid out of the union's strike fund. Small wonder, under those circumstances, that we find the union leader who conducted the strike in New York bulletinizing his members immediately after the strike was over and saying to them, "The fact that we kept out 33"-- or whatever thousand people it was --"on strike, 80% of the membership, for 218 days," he says, "That fact is an incredible phenomenon, and it is due to

three outstanding causes: 1) dedication and spirit of the strikers, 2) unemployment insurance, 3) the effectiveness of the CWA's strike fund."

And the strike fund rightfully took third place in view of what I have said to you about the comparative figures between them.

The union involved in the strike publicly referred to the strike as "our strike weapon." They saw it very realistically, that what this was was a strike weapon, an economic weapon. And that's what accounted for what they called the "phenomenon" of the 218-day holdout.

Now, it should not be supposed for a moment that this was an isolated instance. According to New York Labor Department statistics, almost 10% of the strikes over a period of some fifteen or twenty years, published statistics, almost 10% lasted eight weeks or more. Thirteen point eight percent of all employees involved in strikes were involved in such lengthy strikes, and 51% of all man-days made idle by these lengthy strikes -- or rather 51% of all man-days made idle in all strikes were attributable to these lengthy, more than eight-week, strikes.

QUESTION: Mr. Benetar, what percent of the wages that a person earns is paid by unemployment compensation?

MR. BENETAR: Up to 50%, tax free. And testimony at the trial was that what they get from unemployment compensation

is enough to take care of the necessities of life. It is more than they would get from most unions in strike benefits, considerably more. In fact, this union stopped giving out benefits for food as soon as unemployment compensation took over. They were relieved of that burden, which was rightfully theirs if the neutrality principle is to control.

In the brief of the Rochester Telephone Company and others as amicus here, are listed, in addition to the statistics I have given you, pending actions, where other employers of New York State have been injured by the situation I have just been describing.

Now, the guiding principles against which the miscellaneous items of legislative history -- and I characterize them that way because I think that's what they are -- strung together, miscellaneous items, some pointing in one direction, some pointing in another, but none of them speaking out and saying it is Congress' intent to allow this as an exception to the rule of neutrality.

QUESTION: But at that time, Mr. Benetar, had the rule of neutrality ever really been discussed by Congress? Wasn't that something the Court found a few years later?

MR. BENETAR: I think the rule of neutrality, of course, was discerned and laid down by this Court,and I presume that this Court's discernment went to the question of what Congress intended in the first place by it. And as I look at

the picture --

QUESTION: But there isn't much legislative history discussing the rule of neutrality, is there?

MR. BENETAR: But the legislative history summarized in Lockrich says that Congress acted because of the "perceived inability of the states to handle these problems in a uniform, coherent manner and to balance the respective equities or strengths of the parties." Congress was dissatisfied with the way one state would go one way, helping unions, and another state would go another way, helping employers.

I believe, Mr. Justice Stevens, that when you look at the structure of that Act and you see how Government acts as a policeman, but in no place does it come into the actual bargaining, I believe the doctrine of neutrality was implicit in there from the date the statute was signed into law by the President.

I believe that when this Court announced what that case meant, I think they were reading Congress' mind in the clearest possible way.

These principles which have been discerned in this area are that states may not legislate when a tendency to frustrate the operation of Federal law scheme, or which creates substantial risk of conflict with policy central to the Federal Labor law: Free collective bargaining, dictating Government neutrality and banning strikes or state entry into areas left

to the free play of economic forces -- and, by the way, my remarks are sprinkled with quotations from this Court. It is hard to talk about this subject without picking up the phrases that have gone through the decisions here and as the Court, through what it calls the "process of elucidating litigation" has clarified the intent of Congress by the kind of phrases that I have been using. They are not mine. Most of them are borrowed from Supreme Court decisions.

Lodge 76 tells us that this neutrality goes to the very heart of the Federal policy. Now the use of economic forces by either party is part and parcel of the process, and not a grudging exception. If the parties look for economic combat, they must look to themselves to carry it on. And this is the catalyst which Congress and this Court looked for to bring about settlements.

QUESTION: The Second Circuit relied on that very case, didn't it? The Second Circuit's opinion in this case relied on the Lodge 76 case, did it not?

MR. BENETAR: Well, if they did, I don't recall their citing Lodge 76. Yes, they did, but one can cite a case, but when you read Lodge 76, there is no way, in my opinion, of its supporting what the Second Circuit did, because the case reaffirms in the clearest terms that what I have said is true, and that the catalyst relied on by Congress and by this Court, as seen from the words of the Act, "the catalyst relied

on is the unaided struggle between the parties, leading one of them to say, 'We've had enough.'" And the Government is not supposed to enter into that area.

"In a preemption case, such as this," says Lodge 76, "the crucial inquiry is whether Congress intended this field to be unregulated because it was left to be controlled by the free play of economic forces."

And that's where Lodge 76 was cited, Mr. Justice Marshall, that's where it was cited by the Second Circuit.

QUESTION: Obviously, I knew that. That's why I asked the question.

MR. BENETAR: I simply wanted to --

QUESTION: I was trying to find out your view of it.

MR. BENETAR: Well, my view of it is that the error below was compounded by their recognition of the principle, without giving it effect. That's my view of it. I think what they did was to take a principle of great weight and then, from these fragments of so-called legislative history, they drew an inference admitting that Congress had not spoken clearly on this. They drew an inference that Congress intended to violate the very policy which they were quoting from.

I don't think that when you take inference from ambiguous, uncertain legislative history which points in two directions and you pit it against the centerpiece of the national scheme that you can come out with a result which

justifies the piercing or the violation or the invasion of the national scheme.

The proven effect of the New York statute, no doubt about it, acknowledged by the Second Circuit -- They acknowledged, too, that there is this conflict. The proven effect is to alter the balance of power between the parties.

Let's just briefly take a look at that history, in an overall sense, because we have briefed the details of it. The Court of Appeals, as I've said, acknowledged that there is no positive expression of congressional intent. The First Circuit in Grinnell went through that whole list of items of congressional history and reached the conclusion that it was not sufficiently clear to establish congressional intent either way. Prior to the Second Circuit's decision in this case, every other Federal court that considered the matter reached the same conclusion.

An inconclusive legislative record, we submit, is not an adequate basis for permitting New York's interference with Federal policy as found by the court's below. We are in a particularly tender area. As Professor Cox has said, "Where a state law is based on an accommodation of the special interests of employers, unions and employees in collective bargaining, the balance struck by Congress among those same interests requires exclusion, unless Congress has provided otherwise."

Congress has not provided otherwise, and there is no reliable indication that it even intended to provide otherwise.

The recent decision of this Court in the Malone case stresses the question of clarity. How much clarity is really needed before one can say that a key tenet of the Federal policy has been violated?

MR. CHIEF JUSTICE BURGER: Very well.

Mrs. Marcus.

ORAL ARGUMENT OF MARIA LENHOFF MARCUS, ESQ.,

ON BEHALF OF THE RESPONDENTS

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

I am Maria L. Marcus, Special Assistant Attorney General, representing Respondents here.

Preemption is a doctrine designed to give effect to congressional intent, not to overcome it. As the unanimous decision of the Second Circuit in this case points out, the key to that intent is in the Social Security Act, not in the National Labor Relations Act, for the NLRA contains no specific direction as to the extent to which states are permitted to regulate labor-management controversies.

Now, when Congress faces up to the preemption question in enacting second law, this Court has looked to the more pertinent Federal provision in disposing of preemption

claims.

A most recent example of this was in Malone v. White Motor Corp., where the employer, like Petitioners here, argued that the NLRA's policy of free collective bargaining was absolute, and that, therefore, the state statute there, which actually altered the term of the collective bargaining agreement, must violate the Federal regulatory scheme and be struck down.

This Court upheld the state's right to act, pointing to the Welfare Pension Plans Disclosure Act as a better indicia of congressional intent.

Petitioners here say that this Court should simply, on the basis of the general preemption principles derived from the NLRA, hold that the state has no right to give unemployment benefits to strikers. Congress directly faced this question in enacting the Social Security Act and it decided that with three very narrow exceptions, that the state was free to grant such benefits or to refuse to do so.

Social Security Act received its impetus, as this Court has recognized, from the President's Committee on Economic Security, whose Advisory Council said, "When you enact the Social Security Act, don't let the states pay unemployment benefits to strikers." Senator Wagner, who was the sponsor of both the NLRA and Social Security Acts and who was also the first witness in the hearings on the Social Security Act, took a different view. He said, "There should be practically no

restrictions on the states in the kind of programs that they can write."

Now, Congress ultimately did pass some restrictions dealing with payment of unemployment compensation during strikes, but aside from those restrictions, consciously left the rest to the states for determination. It was extremely important at that time that all the states pass unemployment compensation laws, because if they didn't the purpose of the Social Security Act would have been frustrated. And to make sure that all of the states came into the field Congress enacted extremely strong and elaborate incentives to induce the states to come in.

The Senate Finance Committee report, in explaining the approach of Congress passing the Social Security Act, said that they wanted the states to proceed without dictation from Washington, and they recognized New York, whose statute was already in existence in substantially the same form as we have it today, as one of the kind of laws that they sought to encourage the other states to pass.

Now, as far as the experience rating aspect, which Counsel has referred to and which Mr. Justice Marshall asked about, the fact is that on the face of New York's law it was already indicated that New York was contemplating passing such a provision. And, what is more important, Congress itself wanted all the states to have experience rating provisions and

included incentives to persuade the states to put experience rating into all their laws. So, they wanted the states to proceed on that basis.

The Social Security Act and the National Labor Relations Act were passed during the same five-week period, by the same Congress sitting in the same session.

There is no preemption here. There is not a vestige of support in the legislative history of the National Labor Relations Act for any such preemption. The National Labor Relations Board, through the agency in charge of interpreting and enforcing the law, says that there is no preemption here, as does the United States of America, who was come in on the same brief, as amicus curiae in this Court.

The question of preemption is not, as Counsel has been indicating, a constitutional principle. This Court said, in Retail Clerks v. Spermihorn that preemption is merely a rationalization of the coexistence of Federal and state agencies in the same labor relations field. It is not a constitutional principle at all.

QUESTION: Well, preemption, generally, is a constitutional principle, stemming from the Supremacy Clause.

MRS. MARCUS: It becomes a constitutional matter by virtue of the fact that if the two laws are inconsistent then the Federal law is stronger, but --

QUESTION: That's because of the Constitution of the

United States and specifically the Supremacy Clause.

MRS. MARCUS: But what this Court meant in stating, directly stating -- I am quoting from the decision that pre-emption is not a constitutional principle -- It simply meant that the idea of not having the states in the field at all is not part of the preemption concept. The preemption concept simply points to what Congress had in mind. Congress, the ultimate touchstone of deciding whether in fact it wishes to have some state regulation, have a great deal or to have none at all.

Now, in the Social Security Act, the incentives that I referred to were a really very strong either-or. And to give you the idea of what that either-or was, for the states that refused to pass a law, this is what would happen. Their employers would have to pay a 3% payroll tax on a portion of the salaries of all their employees, and that money would never be returned to the states in any form, but would simply go to the Federal Government, in fact, support unemployment insurance programs in other states. That's what would happen if the state refused to pass an unemployment compensation law.

On the other hand, if it passed one, each employer would receive a 90% tax credit, which he would receive merely by virtue of paying the state tax, whatever that state tax was. Whether the state tax was at the maximum the state set or nothing at all, he would still receive that 90% tax credit.

And the other 10% which was not wiped out by the credit would, in any event, be returned to the state, either to support Federal benefits or to help administer the program.

So, that was an extremely pervasive kind of incentive. In fact, so much so that the law was challenged as usurping state powers, as coercing the states to come into the field. And this Court considered that question in Stewart v. Machine Company and it decided that, yes, these were very pervasive incentives, but because of the latitude given to the states in developing their own program, that Congress was entitled to keep those incentives in the law.

So, Congress has, from the very inception of both the NLRA and the Social Security Act, considered the interrelation of unemployment insurance and the economics of labor disputes.

QUESTION: Now, you say, as though that statement followed from what you have told us. It doesn't seem to me that it does.

MRS. MARCUS: Well, from the very beginning they had what was a strong and flat-out recommendation by the very group that was the impetus for the passage of the law, "Don't let the states pay."

And what Congress did at that point was say, "Well, we are going to look into that area, and we will put down some restrictions," which they did.

QUESTION: What were those restrictions?

MRS. MARCUS: Those restrictions, for example, were that if a worker refused to seek new or accept new work at a struck job that he couldn't be denied unemployment benefits. Also --

QUESTION: That if he failed to seek new work he could be denied?

MRS. MARCUS: In other words, the question of what kind of new work. Under all unemployment plans, under all state laws, a person is obliged to seek other work --

QUESTION: To seek new comparable work.

MRS. MARCUS: -- and what Congress wanted to make sure of is that the state didn't say to this worker, "You've got a possible job. You can go and work at X plant which is being struck by its employees." And Congress said, "No, you can't deny benefits to somebody because they refuse to work for an employer who is involved in a labor controversy."

And the other restrictions involved such things as not permitting denial of benefits for somebody who refused to work for less than the prevailing wage in the area, and refused to join a place where they were not allowed to be union members. So, those were some of the restrictions which Congress did impose, and which were in the area of labor-management controversy, but they refused to go along with the recommendation of the President's Committee, despite its preeminent position as

the actual impetus of the whole Act.

QUESTION: To prevent any state plan from allowing payment of unemployment compensation to strikers.

MRS. MARCUS: To prevent any state plan from paying, under the various options that already exist, from paying unemployment compensation.

QUESTION: To the extent that Congress required the states to pay unemployment compensation to an unemployed person who refused to cross a picket line, they did then insert themselves in a certain extent into the -- Or perhaps a better way to put it is, they required the states to insert themselves into the economic warfare.

MRS. MARCUS: Yes. They certainly were thinking along the lines that the President's Committee asked them to think along. What they said was, "We will put this restriction on the states, but we will not put down the flat restriction that the President's Committee asked us to do. We will do this. We will put in this that has to do with labor-management controversies, but we won't go as far as we were asked to do and flatly prevent the state from developing its own program."

QUESTION: They moved the other way from the recommendation of the President's Committee, but they moved only slightly.

MRS. MARCUS: Yes, that is correct.

So, we've got the Social Security Act, which I think, in itself, provides a basis for the rejection of the preemption claim here. But, in addition, there are other and independent grounds for dismissal of these claims.

Now, Petitioners have said that a uniform national standard on the payment of unemployment benefits, during industrial controversies, is essential to the Federal labor scheme.

Congress thinks otherwise, and its views, rather than economic theory, which are controlling. Congress' view has come out in a variety of different statutes. Now, we have noted that the NLRA and the Social Security Act were passed at the same time by the same Congress sitting in the same session. In 1947, there was an attempt to amend the National Labor Relations Act. In fact, the House passed amendments, which said that any employee who received unemployment compensation while he was on strike would be deprived of his protection and status as an employee, under the NLRA. The House Minority report, in commenting on that, interestingly enough, pointed to the Social Security Act as the core of Congress' intent on the question, and said, "Under the Social Security Act, this matter has advisedly been left to the states." That was their criticism of the House amendments. The Senate refused to go along with those amendments and they were dropped.

Then, in the Railroad Insurance Act, you have a

situation which has lasted for more than forty years where there is a requirement of paying unemployment benefits to striking railway workers. There have been a number of amendments of that original scheme, amendments to raise the benefit levels and increase the duration of paying benefits. But from its inception it has been an all employer-financed scheme.

QUESTION: But the labor disputes under that are governed by the Railway Labor Act.

MRS. MARCUS: Yes, they are. While there are some differences in structure, this Court pointed out in Locomotive Engineers v. Baltimore and Ohio that those differences go to the beginning of the labor dispute, where there are various mediation provisions which must be followed. But that once those initial stages are over, the parties are in the same position as they are under the NLRA, self-help and collective bargaining. So, there are obviously similar features in both laws.

QUESTION: One of them that you have just pointed out that is quite different is that Congress requires the payment of unemployment benefits to striking railroad workers, whereas it doesn't to striking workers in other areas.

MRS. MARCUS: It does not require them, Your Honor, but it permits them, under the plan --

QUESTION: Well, that's the issue in this case.

MRS. MARCUS: Yes, it is. Under the plan of the

Social Security Act, I think it has to be kept in mind what that plan was. The plan was to give permission to the states which were plenary and general, and to spell out only those few areas in which the states were restricted. That's how the law is set up. It wasn't set up with a million, "You may do this and this and this," but rather because of the need to bring the states into the field, the urgent Federal-State cooperation that was absolutely essential to the success of the Social Security Act, the plan was to make clear to the states that they had this broad latitude, that there would be no dictation from Washington, and that they would be restricted in only a few particulars, all of which were set out in the Act. That was how the Act was structured.

Then, when Congress considered the question of food stamps and whether they should be granted to strikers, Congress had another opportunity to look at the relation of the payment of public benefits and the economics of labor disputes. And what they said there was that food stamps must be paid to strikers and the reason that they gave was that to deny benefits would be to take sides in labor disputes.

So, obviously, the idea of neutrality which Petitioners are trying to present here is quite different from Congress' idea of neutrality.

In AFDCU, uniform definitions were established by Congress, but the HEW Secretary, under a regulation upheld by

this Court, did preserve local options to the states, who could take their choice as to whether to grant benefits or to refuse to do so.

A contemporary congressional expression about the Social Security Act also occurred when the Nixon Administration in the 91st Congress era asked that the Congress supply the bar against striker benefits which the Petitioners are now asking from the Judiciary. They said, "Don't let the states pay unemployment benefits to strikers." Congress refused to go along with that recommendation and Representative Mills, who was Chairman of the Ways and Means Committee, said in floor debate, "Well, for example, there are states that pay unemployment benefits to strikers. I wouldn't vote for it, but if they want to do it, why shouldn't they have the latitude to write the program they want."

QUESTION: How many states do pay benefits? I know it is in your brief, but I haven't seen that for a long time.

MRS. MARCUS: The vast majority of states, Your Honor, do pay under a variety of different schemes. Some, for example, pay if the employer continues in operation during the strike. Some pay if there is a strike protesting against hazardous conditions. Some pay if the employer violates his own labor contract. Some pay if the employer violates Federal Labor law. Some pay if the employer violates State Labor law.

QUESTION: How many pay, just indiscriminantly, to any economic strike?

MRS. MARCUS: I don't know that -- Either they have the provision that we have, which provides a suspension period, which eliminates the vast bulk of strikes from consideration altogether, or they fix on particular circumstances, under which the benefits should be paid.

QUESTION: My question was how many do not fix on particular circumstances?

MRS. MARCUS: In other words, how many are like New York's law and have the suspension period?

Rhode Island and possibly the Virgin Islands. But Rhode Island has our suspension period approach, which eliminates the vast majority of strikes.

QUESTION: Hawaii had that if the employer stays in business with 80% of his --

MRS. MARCUS: Correct. Hawaii has the same kind of statute as this Court upheld in the Kimball case, that is, if the employer continues in substantial operation, then the benefits will be paid.

QUESTION: But only New York and Rhose Island and possibly the Virgin Islands?

MRS. MARCUS: Have this particular approach.

QUESTION: That is, pay out in any economic strike at least after a waiting period.

MRS. MARCUS: Yes, but pay nothing, no matter what the circumstances, during the suspension period, which eliminates most strikes from any payment altogether. Whereas, the other schemes, by and large, pay at the outset of the strike after a normal waiting period, if the circumstances are what the statute includes.

QUESTION: Your position here would be the same whether there were a waiting period or not, would it not?

MRS. MARCUS: Our position is that what Congress did in the Social Security Act was to give plenary and general permission to the states to develop whatever kind of program they wished, and what was set out in the Social Security Act were the restrictions and not the permissions.

QUESTION: I think your brief retreats from the rational conclusion of that position, i.e., if a state decided to pay double wages to strikers, you would have a hard time.

MRS. MARCUS: Well, I think, Your Honor, that the Congress certainly didn't prohibit any of the possible options, but it would be unfeasible and unpolitical to have anything like that happen. I think if it did, of course, Congress would move in, as it has left itself room to do, by a provision in the Social Security Act which says no vested rights --

QUESTION: There would be no preemption of that. If a state decided economic strikers are going to be paid double what they would get by working. You think there would be no

preemption problem there?

MRS. MARCUS: Congress did not prohibit whatever option the states adopt. However, I think that the wisdom of Congress in supposing that the states would act reasonably -- because the example that Your Honor gives is very unreasonable and a bad policy -- but --

QUESTION: It is given in your brief, if I am not mistaken, isn't it? Some amicus brief, perhaps.

MRS. MARCUS: No, not that example.

I think that the confidence that Congress had that, obviously, the states would not do something unreasonable has been justified by the fact that in 40 years --

QUESTION: Sometimes that is quite a violent assumption.

MRS. MARCUS: -- in 50 different states nothing like that has ever occurred. No state has ever passed any such unreasonble law, and we have had 50 jurisdictions to experiment in and more than 40 years for that to have happened. I think the states have justified Congress' confidence in not having --

QUESTION: I think your opponents think that New York and Rhode Island have an unreasonable law.

MRS. MARCUS: Yes, but the example that Mr. Justice Stewart has cited is very far from anything that has occurred or I think would occur.

It is clear from the examples of all these different statutes that a uniform policy on the payment of unemployment benefits to strikers is not essential to the Federal regulatory scheme, and that Congress has repeatedly said so and indicated so. I want to point out that we are looking, in presenting this legislative history to this Court, at the same kind of documents, the same kind of amendments, refusals to amend, specific legislative reports, floor debate -- the exact same kind of documents that this Court considered in Hotery.

QUESTION: But, Mrs. Marcus, I don't think your opponent really says that there needs to be a uniform policy. I think what they are saying is anything is all right, so long as it doesn't interfere with the overriding policy of neutrality.

MRS. MARCUS: Well, my understanding of what Petitioners are urging here is that the payment of unemployment benefits during strikes, which includes all the different options that all the different states have adopted, can't be done, and that, therefore, the uniform policy that they are presupposing is that you don't pay any unemployment benefits during strikes under any possible option or approach.

Now, that is a uniform policy and, in fact, the words are used a number of different times in the petition and in Petitioners' brief that the Federal Government requires a uniform national policy on the question. And the policy is --

QUESTION: In this precise area. But your opponent doesn't question at all the autonomy of the states to indulge in all the variety they want to in other areas of unemployment compensation.

MRS. MARCUS: No. In the question of paying unemployment benefits to strikers, no matter what the option is, no matter what the version, no matter what the money, no matter what the circumstances, no pay under any circumstances. And they have repeatedly used the phrase --

QUESTION: I am not sure that's a fair statement of their position. They rely very heavily on the trial court findings that here there is an actual impact on the bargaining positions of the respective parties. It seems to me that consistently with that view they admit, for example, welfare payments are all right, that there could be lesser amounts of money, something much less than $49 million that would not tip the scales. I don't think their argument goes -- is sort of an automatic rule.

MRS. MARCUS: Well, they have repeatedly used the phrase that a uniform national policy is essential.

QUESTION: To the extent of neutrality.

MRS. MARCUS: To the extent that you can't pay unemployment benefits during strikes. And that's what the vast majority of states do.

MRS. MARCUS: If they concede welfare benefits are

all right, I don't know why they wouldn't concede that unemployment benefits of no greater amount, or something like that, wouldn't also be all right.

MRS. MARCUS: I think that's an inconsistency in their position, but I think it is fair that --

QUESTION: Well, even if they concede it, we don't have to decide that much anyway. All we have to decide is when there is admitted -- You don't deny the finding of an actual impact on the bargaining --

MRS. MARCUS: Yes, indeed, we do, Your Honor.

QUESTION: Despite the two-court rule?

MRS. MARCUS: Yes. I think what the Second Circuit was doing -- they didn't really discuss or consider the facts at all. They simply said that, even viewing Petitioner's case in its best light, and even assuming there were such a conflict, it wouldn't matter, because Congress had said that the states may legislate. And I think that's absolutely true.

QUESTION: These were findings by a district court which were not upset by the Court of Appeals. And you are familiar, of course, with the two-court rule, aren't you?

MRS. MARCUS: Yes. And I think that, by and large, it doesn't matter whether there were -- in other words, we don't feel -- We feel that the record overwhelmingly refutes the impact, because of the statistics that we evolved. But that is really irrelevant to the issue here, because the

question is: What did Congress intend? And that intention is clear from the legislative history, not only of the Social Security Act, but all the other statutes in which Congress has had the opportunity to consider this question.

QUESTION: Is what you are saying that the Court of Appeals said, basically, assuming for the sake of argument that the District Court's findings are correct and, therefore, we will not review them on a clearly erroneous basis, we nonetheless find --

MRS. MARCUS: They were not interested in the facts, and properly so, because the question of preemption is not one of economic theory. It is one of congressional intent.

QUESTION: It can be one of economic fact, though, can't it?

MRS. MARCUS: But here the question is: Did Congress permit, did Congress intend that the states have the latitude that we say that the Social Security Act and these other statutes demonstrate? And if that is so, then, the states have the right to choose whatever options they wish.

Now, the New York statute --

QUESTION: Could the state adopt a law that in any strike the union shall pay for the losses of management?

MRS. MARCUS: Well, that hasn't to do with unemployment compensation, though. I couldn't say what restrictions there might be on that. The issue here really is what did the

Social Security Act allow the state to do as far as payment of unemployment compensation?

QUESTION: Suppose the state said that where there is a strike the management shall contribute to the unemployment insurance whatever amount there is left, over what they lose in the strike?

MRS. MARCUS: That the employer should contribute to the --

QUESTION: Fund.

MRS. MARCUS: Well, the method of financing the unemployment --

QUESTION: We are just trying to get something that has something to do with unemployment and I assume financing is. That's all.

MRS. MARCUS: Yes. The method --

QUESTION: I don't think you need to take the position that the states are left free to do whatever they please. And that's what you keep saying. You don't need it for this case, do you?

MRS. MARCUS: Perhaps, we don't, but --

QUESTION: Well, why keep pushing for it?

MRS. MARCUS: It was, I believe, in answer to a question about what the Social Security Act did. And I think it is clear that its structure was to give this broad permission, but what is, I think, equally significant here is that

New York law existed at the time that the Social Security Act and National Labor Relations Act were passed. So it is clear that --

QUESTION: May I take Justice Marshall's question one step further? In the brief the Government has filed, they give you the hypothetical example of requiring 100% of the wages during the period of the strike, and they seem to say that would be preemptive -- the statute that provided that. Would you agree with that concession by the United States?

MRS. MARCUS: No, I really wouldn't because I think, as I said, the Social Security Act did give a plenary and general permission. However, that would be unfeasible and politically -- It is a thing that couldn't happen, but it is a thing that Congress would have to move in then to prevent as it can and frequently does. But, as I said before, the confidence that Congress visited in us has not been abused by that sort of provision.

In conclusion, I would like to say that at stake in this case is the state's right to determine what is in the best interest of New York citizens. And Congress has given New York that right, given it that right, knowing exactly what New York's law said at the time that it passed both statutes that we are speaking of. And it is rare that you have so many different indications of congressional intent all pointing in the same direction.

Petitioners proffer in response only a general pre-emption principle derived from the overall plan of the NLRA, which has never been held to be absolute. And for this reason we urge the affirmance of the unanimous decision of the Second Circuit.

MR. CHIEF JUSTICE BURGER: Thank you, Mrs. Marcus.

Thank you, Mr. Benetar.

The case is submitted.

(Whereupon, at 11:03 o'clock, a.m., the case was submitted.)