In the

Supreme Court of the United States

H. A. ARTISTS & ASSOCIATES, INC., ET AL.,	)	
PETITIONERS,	)	No. 80-348
V.	)	
ACTORS' EQUITY ASSOCIATION ET AL.	)	

Washington, D.C.
March 23, 1981

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ORIGINAL

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H. A. ARTISTS & ASSOCIATES, INC., ET AL.,
Petitioners,
v.
ACTORS' EQUITY ASSOCIATION ET AL.

No. 80-348

Washington, D. C.

Monday, March 23, 1981

The above-entitled case came on for oral argument before the Supreme Court of the United States at 1:03 o'clock p.m.

APPEARANCES:

HOWARD BREINDEL, ESQ., 530 Fifth Avenue, New York, New York 10036; on behalf of the Petitioners.

JEROME B. LURIE, ESQ., Cohn Glickstein Lurie Ostrin Lubell & Lubell, 1370 Avenue of the Americas, New York New York 10019; on behalf of the Respondents.

LAURENCE GOLD, ESQ., 815 Sixteenth Street, N.W., Washington, D.C. 20006; on behalf of the AFL-CIO as amicus curiae.

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 H. A. Artists and Associates v. Actors' Equity.

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

ORAL ARGUMENT OF HOWARD BREINDEL, ESQ.,

ON BEHALF OF THE PETITIONERS

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

This is a case which involves the very difficult and complex interplay of our federal antitrust laws which promote competition, our federal labor laws which tend to stifle competition, and a labor exemption which attempts to accommodate these conflicting laws.

There is very little dispute over the basic operative facts here. Equity is a union whose 23,000 members include virtually every actor who is allowed to appear on the legitimate stage in the United States. Petitioners are theatrical agents located in New York City. They represent actors who belong to Actors' Equity. Although they are independent contractors, the petitioners as agents perform services and in effect work for the actors who are members of Actor's Equity. All of the petitioners are regulated and licensed as employment agencies under New York State law. All are members of NATR, the National Association of Talent

Representatives, a trade association of theatrical agents located in New York City.

TARA is a similar trade association of theatrical agents located in New York City. The members of TARA compete with the members of NATR. Most of the petitioners are very small agencies. They employ no more than two or three agents and they very rarely represent stars.

TARA's members, on the other hand, include such industry giants as William Morris, and International Creative Management, each of whom alone employ approximately 200 agents. They represent many, many stars and they very rarely get a job for one of their clients at a scale or minimum wage.

For the last 50 years or so Equity's franchising rules have been in effect. The rules were last revised in October, 1977, pursuant to an agreement between Equity and TARA. Equity and TARA's franchise rules provide that Equity members cannot deal with non-franchised agents, they provide the maximum commissions which Equity agents may charge, they provide the terms and conditions under which agents may charge commissions.

Agents may not charge commissions on a scale job, they may not charge commission on a chorus job, and they may not charge commission on rehearsal pay.

QUESTION: I gather then that if an agent all year

long never got a job for any of his clients above scale he wouldn't make anything?

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

QUESTION: And that isn't very likely, though, is it?

MR. BREINDEL: It isn't very likely because most of the agents will also place actors in non-Equity jobs, but there are many petitioners who place a lot of actors in scale jobs; scale jobs predominate over non-scale jobs.

QUESTION: So, why will agents do that for nothing?

MR. BREINDEL: Well, they will do it for nothing because the actors are their clients, they want to accommodate these actors, they hope that maybe some day an actor will become a star. But the basic reason they do it for nothing is --

QUESTION: And then he'll be paid a good deal above scale and he could make up to ten percent?

MR. BREINDEL: If he stays with him. But the basic reason why agents will get actors scale jobs is they don't set out to get an actor a scale job. They go to the producer and they say, I have a terrific actor for you. The producer says, all right, but I'm only going to pay you scale. Well, the agent has now gotten the producer interested; he's going to allow his client, the actor, to have the opportunity to work for scale, even though the agent in his own self interest tried to get the actor above scale.

The franchise rules, in addition, provide that all disputes between an actor and an agent must be submitted to arbitration. They provide that the union may discipline the agents. This discipline can include fines of up to $5,000, forfeiture of commissions, and revocation of the franchise. In addition, agents must --

QUESTION: Do producers ever pay agents?

MR. BREINDEL: It's strictly prohibited.

QUESTION: By whom?

MR. BREINDEL: By the Equity's --

QUESTION: Under state law or by -- or both?

MR. BREINDEL: Well, I believe it's prohibited by Equity's rules and by-laws.

QUESTION: That's because it necessarily would follow that if they weren't paying the agent maybe they would have paid the actor?

MR. BREINDEL: Well, I think the basic reason is there's no need for producers to pay agents. The agents are knocking on the producers' door.

Equity has collective bargaining agreements with all theatrical producers who employ Equity members. Thus it has collective bargaining agreements with nine separate groups of producers. It's probably best known for its collective bargaining agreement with the League of New York Theaters, which governs wages and working conditions on Broadway.

These agreements are all negotiated by Equity and the producers. The agents do not participate in the negotiations for the collective bargaining agreements. An actor is free to negotiate a wage above the minimum set forth in a collective bargaining agreement, but neither the actor, the producer, nor the agent may diminish the minimum or scale wage set forth in an Equity collective bargaining agreement.

Under Equity's system the Equity producer directly pays the Equity actor. In addition the Equity producer must post a bond guaranteeing payment of scale wages to union members.

The primary legal issue before us today is the applicability of the statutory labor exemption to Equity's franchising system. If the agent is a part of the union's labor group, the statutory exemption is applicable. Under Carroll independent --

QUESTION: Mr. Breindel, before you get to that, am I correct in thinking the Court of Appeals made no finding as to whether this conduct was a violation of the Antitrust Act?

MR. BREINDEL: That's correct.

QUESTION: It simply went directly to the labor exemption without determining whether the conduct would be actionable under the antitrust laws?

MR. BREINDEL: That is correct. Both the Court of

Appeals and the district court reached only one issue and that was the applicability of the statutory labor exemption. Under Carroll, independent contractors such as the theatrical agents in this case are part of the union's labor group if there is present a job or wage competition or some other economic interrelationship affecting a legitimate union interest between the union member and the actor.

Prior to this Court's decision in Carroll, no court had ever held that a non-union member was a part of a labor group unless the non-union member was in a wage or job competition, or performed basically the same function as the union member. In Carroll, for the first time, the Court held that a non-union member who was not in a wage or job competition could be part of the union's labor group.

QUESTION: Could you prevail without our overruling Carroll?

MR. BREINDEL: I believe so. It's our position that Carroll is a very unique decision which should be confined to peculiar facts. In Carroll the Supreme Court was dealing with the AFM's activities in the unusual one-shot club date music field. The primary purpose of unions is the negotiation of collective bargaining agreements. Nevertheless, in the club date music industry there are no collective bargaining agreements. To the best of our knowledge, and the unions haven't cited any exceptions, the club date music

industry is the only industry where you have unions and no collective bargaining agreements. This is apparently due to the very diverse nature of the club date music employers. These employers generally hire bands for non-commercial purposes sporadically, often once in a lifetime.

A typical club date employer is the father of the bride who hires a band for his daughter's wedding. It's obviously impossible for the AFM to negotiate a collective bargaining agreement with a group as diverse as fathers of the bride. Because there was no collective bargaining agreement in Carroll, the union in order to insure that its musician members got scale wages unilaterally mandated scale wages.

Now, in Carroll, in order to provide that agents would then not book jobs for union members at less than scale, they had to regulate the agents. In Carroll the club date employers, the fathers of the bride, did not pay the union member musicians directly. This is unlike the situation of Equity where Equity producers directly play Equity actors.

In Carroll the club date employers paid the orchestra leaders who often function also as booking agents. Accordingly, if the agents were not regulated by the union, there was no assurance that the agents would pay scale or any other wages over to the union members. The Carroll Court predicated its regulation of agents upon two very specific findings of fact, and I quote them: "The booking agent

regulations were adopted because of experience that (1) many booking agents charged exorbitant fees to members, and (2) booked engagements for musicians at wages which were below union scale." This is from page 113.

Here, as I previously noted, it is impossible for a theatrical agent to book a job for an Equity member at less than scale because of Equity's collective bargaining agreement. Thus, Equity has not even attempted to prove that since the advent of collective bargaining agreements any theatrical agent ever booked a job for any Equity member at less than scale.

QUESTION: But if you're right, it would mean that the agent would be free and the actor would be free to let the agent collect, say, ten percent of a scale wage as a commission?

MR. BREINDEL: That's correct.

QUESTION: And that means that the actor is getting less than scale?

MR. BREINDEL: I don't believe --

QUESTION: He's netting less than scale?

MR. BREINDEL: Well, he may be -- one way of looking at it, he's netting less than scale, but what happens is, an Equity producer pays an actor. The actor cashes his check. He has disposable income. He can pay his landlord, he can pay his doctor, he can pay his grocer, and he may even pay his

agent, but it's coming out of disposable income. Now --

QUESTION: And he can't pay him more than ten percent, anyway?

MR. BREINDEL: Not under New York State law which governs each and every petitioner in this action.

The crux of Carroll, I think, is illustrated by the AFM's licensing agreement in Carroll. The AFM's licensing agreement in Carroll restricted booking agents from booking jobs for union members at less than scale wage. If there was a collective bargaining agreement in Carroll, as we have in Equity, that provision in that licensing regulation would be totally useless, and unnecessary. With respect to the Carroll finding of fact that agents charged exorbitant commissions, I first note that in Carroll the AFM permitted the booking agents to charge a commission of 15 percent. Now, there's no evidence that any theatrical agent ever charged an actor a commission of 15 percent, nor is there any evidence that a theatrical agent ever charged an actor a commission in excess of ten percent.

Unlike the situation in Carroll, our agents are all regulated and licensed as employment agencies by New York State law, and as such they cannot charge more than ten percent. I must stress that in Carroll --

QUESTION: Is it rather they are licensed under the general New York law of regulating kickbacks by employment

agencies?

MR. BREINDEL: No, Your Honor, there is a specific law which licenses employment agencies which has very specific provisions dealing with the actual employment agencies.

QUESTION: Well, is it a type of law such as that that was originally invalidated in the '20s by the case of Ribnik v. McBride --

MR. BREINDEL: Yes, it is.

QUESTION: And then later, of that case being later overruled by the Olson case?

MR. BREINDEL: It is, precisely. In Carroll, again, I must stress that the agency regulations were predicated solely upon the effect that agents had upon the union member scale wages. Contrary to the union's arguments here, the Carroll court did not in any way rely on such arguments as agents control access to employment, or that it's necessary to regulate agents' commissions to eliminate wage competition between union members. The unions offer three reasons to justify their pervasive and exhaustive regulation of agents. They say agents control access to employment, they say that the prohibition of commissions on scale jobs is necessary to prevent invasion of union-negotiated minimums, and they say that the regulation of agents' commissions is necessary somehow to eliminate wage competition among union members.

Taken separately or collectively, these reasons do

not justify Equity's exhaustive regulation of agents. Assuming that it is the agents rather than the producers who control access to employment and recognizing that agents admittedly have greater access to most employers than do most actors, that circumstance just does not justify the existence of Equity's pervasive franchising system because it's not intimately related to wages, hours, or working conditions, which are the subject of numerous collective bargaining agreements. The unions have not cited any case in which it was held that a union is justified in imposing restraints of trade upon independent business persons simply because those business persons have greater access to potential employers than union members.

Virtually every employment agency exists in business because that employment agency has greater access to an employer than the applicant does. This is true for employment agencies who place dishwashers, who place corporate executives, who place lawyers. Why should a union member be treated any differently than any applicant who gets a job from an employment agency which is licensed and regulated?

Finally, in this connection, I would note, it's the unions who control access to the employment of agents. The regulation of agents' commissions is not necessary to prevent wage competition among union members. Now, there was no such argument made by the unions below and there was no such

finding by the district court. Nevertheless, the Court of Appeals here held that the union, Equity, could not eliminate wage competition without regulating agents' commissions. There was absolutely no finding of fact in the record to justify that conclusion. There was no evidence offered that if you struck the franchising system it would result in actors competing with each other for agents' services. And there was no such evidence offered because Equity never made that argument.

QUESTION: Well, what if there were proof like that?

MR. BREINDEL: If there was proof like that, it might support the Court of Appeals's conclusion that it's necessary to regulate agents' commissions.

QUESTION: You mean its conclusion that this is within the exemption?

MR. BREINDEL: Yes.

QUESTION: You mean, if there was evidence that there was competition among actors in the sense that one, some actors would offer agents five percent, and others eight percent, and others nine percent, and others ten percent? Is that the kind of competition you're talking about?

MR. BREINDEL: Well, I think that's the kind of competition the union has been talking about.

QUESTION: Well, suppose there was proof that that

would happen, absent this system? Would that put this system within the exemption?

MR. BREINDEL: I would say, no, Your Honor, because the elimination of wage competition --

QUESTION: Well, then, you should argue that even if the Court of Appeals was correct, their conclusion doesn't follow?

MR. BREINDEL: That is correct, Your Honor, and it doesn't follow, because the elimination of wage competition, which is a traditional union labor objective, is the kind of elimination of competition between union members involved in dealing with employers, not union members competing for the services of people such as actors who perform services in turn for the union members. The Court of Appeals did not consider what would happen if the franchising system was struck. I submit that what would happen would be, actors would continue to pay agents their traditional ten percent commission permitted by New York State law. If, despite the lack of evidence, the actors then wanted to compete for an agent's services, they would have to compete by offering the agent a commission in excess of ten percent, which is simply not allowable under New York State law.

QUESTION: No, were offering them ten percent when they get paid according to scale.

MR. BREINDEL: That's correct.

QUESTION: And isn't it almost inevitable that that would happen, that the agents would begin collecting commissions when their clients were being paid scale?

MR. BREINDEL: I don't know if it's inevitable, Your Honor, for this reason. The agents --

QUESTION: That's what you're complaining about, so I assume --

MR. BREINDEL: Well, the agents are now obtaining scale jobs for union members without any commission whatsoever, so it's reasonable to assume that they might, if the prohibition was struck, they might obtain scale jobs for actors at the commission less than ten percent. If they can do it for nothing, it stands to reason that they can do it for something less than ten percent.

QUESTION: Don't we have to presume that if you prevail some, at least some agents will start collecting some commissions when their clients work for scale?

MR. BREINDEL: I think that's a fair presumption.

QUESTION: It seems to me it's inevitable. Now, if that happens, it seems to me there's going to be more money flowing into agents' pockets and more competition for these jobs. Isn't that almost inevitable?

MR. BREINDEL: Well, I think there would be more monies flowing into agents' pockets, but it will soon --

QUESTION: There may be more agents, too.

MR. BREINDEL: It will simply be money that agents have earned.

QUESTION: Well, I'm not saying it's inequitable. I'm not arguing that, but it seems to me you are asking that the market be opened up. That's the theory of your case.

MR. BREINDEL: Well, let's turn to a very practical --

QUESTION: It means you are asking for more competition. Now, whether --

MR. BREINDEL: Yes. Yes. But let's turn to a very practical example, the New York chapter of Screen Actors' Guild, SAG. That particular organization permits its members to pay commissions on scale jobs to agents. Now SAG has submitted a brief to this Court. Nowhere in this brief does SAG contend that its New York actors who pay commissions on scale jobs have as a result not received the minimum wage set forth in SAG's collective bargaining agreements. Nowhere does SAG contend that its members who pay commissions on scale jobs have engaged in wage competition. Nowhere does SAG contend that its New York members --

QUESTION: But they do, they might engage in competition for agents' services by offering higher commissions.

MR. BREINDEL: They might, but there's no evidence of that on this record.

QUESTION: Does the amicus brief suggest that actors

offer different amounts to agents or not?

MR. BREINDEL: That's not only suggested, it states it, but without any record cite.

QUESTION: Well, of course, you are the plaintiff in the case and presumably, unless you can point to some federal law that the defendants have violated, you ought not to prevail, and even if you win here on the labor exemption argument, the case still would have to go back to find out whether the practices were a violation of the antitrust laws.

MR. BREINDEL: That's a possibility --

QUESTION: But the courts below just didn't let you get to the merits of the case.

MR. BREINDEL: That is correct.

QUESTION: They have upheld the affirmative defense of the defendant.

MR. BREINDEL: Exactly.

QUESTION: And therefore, the merits you haven't reached and --

MR. BREINDEL: The merits technically are whether or not the union's franchising agreement is a violation of the Sherman Act, was not decided by either court, although it was fully argued.

QUESTION: Because the courts below held that the defendants are exempt from the Sherman Act.

MR. BREINDEL: Correct. Correct. Let me, if I

might, turn for a moment to the franchise fees. There is a deafening silence from the unions with respect to their lack of efforts to justify the imposition of franchise fees upon agents. The only thing said is an incorrect statement by Equity that there was a factual finding in the court below that Equity's franchise fees were cost justified. Now, there's nothing in Equity's by-laws, in its constitution, or in its agreement with TARA, which requires Equity to limit its franchise fees to the cost it incurs in administering the franchise system.

Now, apart from this, the issue before this Court is not, are Equity's franchise fees cost justified? The issue is, should Carroll be extended to permit Equity to extract franchise fees from agents regardless of the amount?

The justifications given by the union for regulating agents and agents' commissions do not give any support whatsoever to the extraction of franchise fees from agents. If the union did not collect another dime in franchise fees from agents, this would not interfere with union wage scales, it would not interfere with the union goal of eliminating wage competition, it would not interfere with the union's collective bargaining agreement --

QUESTION: Anf, I take it that unless someone -- if somebody says I'll live up to all your rules for the franchise

fee, he is then out of business? I mean, he cannot represent Equity's members?

MR. BREINDEL: Exactly. I don't believe there's any dispute over that. That's one of the prices agents must pay.

QUESTION: And in which event your argument for a violation of the antitrust laws would be what?

MR. BREINDEL: The argument for --

QUESTION: Say you win. How would you argue that as in violation of the antitrust laws?

MR. BREINDEL: Well, I would say the union has a legal monopoly over the labor market of its union members. But the cases are clear that when you abuse and misuse a legal monopoly such as here, by extracting franchise fees from independent businesspersons, you've abused and misused your monopoly power. I think that's clear under such cases as United States v. Griffith and the Ottertail case. It's an improper extension of a legal monopoly.

QUESTION: So you think you have to go at it on the monopoly side rather than on any conspiracy or agreement side?

MR. BREINDEL: Well, in addition to that, Your Honor, I think the franchise agreement between Equity and TARA, which mandates that all franchised agents pay franchise fees is that type of conspiracy or agreement which we are alleging.

QUESTION: And is it part of the agreement between -- is it a part of the franchise agreement between Equity and the franchised agents --

MR. BREINDEL: Yes.

QUESTION: That they won't deal with others?

MR. BREINDEL: Absolutely. And there was a finding of fact by Judge Motley who found as a matter of fact, that TARA, the franchised agents who are parties to the franchise agreement with Equity specifically requested Equity to enforce that rule. But in connection with --

QUESTION: So this is an agreement between, you say, between independent businessmen and the union not to deal with other businessmen?

MR. BREINDEL: Yes. There's no dispute over that fact. If you find that agents are part of the non-labor group, then the franchise agreement which is between Equity and TARA, a group of agents --

QUESTION: Do you see any parallel here at all with the union shop structure in the labor field generally?

MR. BREINDEL: Not really. The union shop structure pertains to a very legitimate traditional union labor objective. That is, getting and keeping more jobs for union members. The franchise agreement which, for example, fixes the prices and commissions that agents may charge, simply goes totally beyond that. The imposition of franchise fees

similarly does.

QUESTION: How much are those fees?

MR. BREINDEL: For Equity the franchise fee, the initial franchise fee, is $200. And then the annual franchise fee for an agent is $60 and for a subagent $40.

QUESTION: Well, that's not very much these days.

MR. BREINDEL: It's not very much, but for these petitioners' agents, who don't make very much, it seems to be a lot to them. Moreover, there are other unions such as SAG which charge thousands of dollars in franchise fees.

QUESTION: Such as what?

MR. BREINDEL: Thousands of dollars.

QUESTION: What union was that?

MR. BREINDEL: Screen Actors Guild.

QUESTION: I see.

MR. BREINDEL: SAG. Now, what will happen here --

QUESTION: But they don't -- that's a different arrangement, isn't it?

MR. BREINDEL: It's basically the same. That's why SAG has submitted an amicus curiae brief, because their arrangement is basically the same as Equity.

QUESTION: They permit, they allow commissions for scale wages?

MR. BREINDEL: The New York chapter, not the Los Angeles chapter, or the Chicago chapter.

QUESTION: The New York chapter allows commissions on scale jobs?

MR. BREINDEL: Right. Correct. But not any of the other chapters of SAG. What's going to happen here if the franchising system is illegal? The primary purpose for which Equity exists, to negotiate collective bargaining agreements, will remain unchanged. Equity is free to bargain collectively, and its collective bargaining agreements will not be affected in any way. The business of finding employment for actors, I submit, will continue unchanged except that agents will now be free to compete with each other and will be free of union domination. In this connection let me point out that there are personal managers who represent Equity actors. These personal managers charge a commission. That commission is not regulated by Equity, nor the terms and conditions upon which personal managers represent Equity actors regulated by Actor's Equity.

Moreover, the personal managers, unlike our theatrical agents, are not regulated by any state law. Nevertheless, Equity continues to exist --

QUESTION: What do the personal managers do? Do they get employment for their clients?

MR. BREINDEL: That's a disputed issue. They're not supposed to. They perform other services, such as getting them coaching lessons, teaching them how to dress, holding

their hands.

QUESTION: But then they're really not comparable to agents. At least, their principal function is not to find jobs and so forth.

MR. BREINDEL: Theoretically, that is correct.

QUESTION: They are sort of like a teacher or something like that, would you say?

MR. BREINDEL: They're a teacher, a confidant, in place --

QUESTION: Just like a mother.

MR. BREINDEL: It's like a stage mother.

QUESTION: They go out on the road, they handle the money, they dole the money out, right?

MR. BREINDEL: Right.

QUESTION: And what they don't ever do is manage. Is that right?

MR. BREINDEL: If the franchising system is struck down, the agents will now be able to bargain with Equity as employers do on equal terms. This will replace the present bargaining situation where Equity tells the agents to take it or leave it. Thus, Howard Hausman, who's the chief negotiator for TARA with Equity, Mr. Hausman is himself an agent and a William Morris agent. He testified as to the last negotiations between Equity and TARA, and this is what he said and I quote: "We all considered that Equity's point of

view was indefensible, outrageous, horrible, wrong, simply because they were expecting agents to subsidize the lowest paid actors, somehow, to work for them without getting paid. We still feel that way. We accepted a deal under which that was imposed on us."

If the Court strikes down the franchising system, it will simply mean that Equity is no longer free to impose a group boycott upon agents. It's no longer free to fix the prices of agents. It's no longer free to force agents to work for nothing, and to do so with immunity by hiding behind a statutory exemption which was designed for totally different purposes. I'll save the rest of my time for rebuttal. Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Lurie, you may proceed when you are ready.

ORAL ARGUMENT OF JEROME B. LURIE, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. LURIE: Mr. Chief Justice, and Members of the Court:

Equity is a union of approximately 23,000 members. They work throughout the country, not just in New York State, and they are engaged, or seeking employment, throughout the country in the legitimate theater. At any one time the overwhelming majority of Equity members are unemployed. They are constantly seeking employment and there was a finding in the

district court that producers as a general practice seek actors through agents and actors who do not have agents do not have the same access to employment as actors who do have agents. As a consequence of the --

QUESTION: Isn't that true of a lot of employment agencies, or rather employers seeking employees through employment agencies, entirely outside of the actors' field?

MR. LURIE: It may be that it is true in some instances, and I would suppose that if there were a union in a similar position where the actors could only get jobs through certain specific employment agencies, that the union would have the right to do something about it. For example, a union I know in the restaurant industry in New York signed a collective bargaining agreement with all the employers which said that employees could only be engaged through the New York State Employment Service, because they didn't want their members who would be hired for jobs to pay employment agency fees. They were protecting, in that case, it seems to me, the minimum wage. Unions in other industries solve this problem by establishing a hiring hall.

QUESTION: The State of New York has addressed it too, has it not, by limiting the amount, or prohibiting any kickbacks to the employer from the employment agency?

MR. LURIE: What they have done, if Your Honor please, is limit commissions to ten percent. That is not all

that we do in this situation. Secondly, even though they have limited commissions to ten percent, it would seem to me that that's no reason why the union should not utilize its best efforts to see to it that the actors do not have to pay unreasonable commissions.

The fact that the state has legislated doesn't mean that we can't act. The state legislating doesn't make something that would be legal if they had not legislated illegal because they did legislate.

QUESTION: Right. The state legislation doesn't prohibit an employment agency from charging only five percent or zero percent, does it?

MR. LURIE: That's right. In addition, if Your Honor please, these agents operate not just in New York City, although the bulk of them are in New York City and some of them are in Los Angeles, but they operate throughout the country, and there is no evidence in this record which indicates that all states throughout the country where actors perform in the legitimate theater have the same rules and regulations. But we do license or franchise agents throughout the country.

QUESTION: Well, would you say, for the purposes of the exemption, which is what we're arguing, that this case is comparable to what it would be if the producers and the union had had an agreement which provided that the producers

would secure actors only through a union, you might call it a hiring hall?

MR. LURIE: If Your Honor please, I think the union would have the right to enter into such an agreement with the producers.

QUESTION: Well, suppose they did?

MR. LURIE: But because of peculiarities of this industry --

QUESTION: I know, but suppose they did, would it be any more suspect than this one, or any less?

MR. LURIE: I'm sorry. I don't understand the question.

QUESTION: Would it be any more exempt or any less exempt under the antitrust laws?

MR. LURIE: Than this?

QUESTION: Yes. Wouldn't it be essentially the same?

MR. LURIE: It would be exempt under the antitrust laws. Hiring --

QUESTION: But no more and no less than -- ?

MR. LURIE: No more and no less.

QUESTION: And it would be prohibited in an open shop state, would it not?

QUESTION: It probably would be, but that's a question for the labor laws --

MR. LURIE: Yes.

QUESTION: Would it be legal if the agreement

provided that the costs of operating the hiring hall be paid by the employers?

MR. LURIE: Well, I think that the National Labor Relations Board has often ruled in this matter that if the employers contribute toward the hiring hall an amount which relates, or, for example, an employee, those hiring halls have to be without discrimination and any individual theoretically can walk in and be sent out, and he can be charged a fee commensurate with the cost of operating his share of the hiring.

QUESTION: Well, is the $200 initiation fee and the $60 annual fee in your view somewhat comparable to that?

MR. LURIE: Well, if Your Honor please, absolutely. I mean, the circuit court in this case, the Court of Appeals in this case found that although there was no evidence in the record as to the cost of the operation, that there was one full-time employee and other people involved, and that as $12,000 was the total that was paid by the agents, that it clearly was commensurate with the cost of the operation.

QUESTION: Mr. Lurie, would your theory make it appropriate for a union to franchise acting teachers?

MR. LURIE: No, it would not, if Your Honor please. If Your Honor pleases, I had that question come up the other day in a different way. There are a group of casting agents in New York who cast for various theaters, like the Public

Theater and other theaters which are constantly casting, and those casting agents have been giving courses, they are teaching courses on how to audition. And there has been a tremendous uproar in Equity because the Equity members say, in order to get jobs in the theaters where these people cast, you have to take the course of the casting agent. And of course, it came up, did we have a right to do anything about that? And I said to the union, very explicitly, we do not have a right. So we can tell our members, you may not go to those courses if you don't want to, and we will possibly discipline you for going to those courses, but you have no right to take any action against the casting directors.

QUESTION: Would you say disciplining your members meant imposition of a fine such as --

MR. LURIE: If Your Honor please, disciplining our members means anything which is permissible and reasonable under the internal -- in accordance with the constitution of the union.

QUESTION: And under our Boeing decision which leaves the substantiality of the fine to the state courts?

MR. LURIE: Yes. I would say we could fine; we might have some problem in expulsion, there are various -- but I'm really not prepared to discuss that aspect at this moment. But I think you could take any usual, normal union disciplinary action. We could fine them, and indeed in this

case, in the case at bar, it is quite clear that when we were having a dispute with the agents about the rules that we were going to promulgate, we informed our members -- and by the way, this is the -- there is a finding in this case by the district court, not disturbed by the Court of Appeals, that there is no combination between this union and the producers in an effort to enforce this system.

There is also a finding in district court that there is no conspiracy between TARA and the union. And by the way, if I may say to the Court --

QUESTION: Isn't there -- the agents who are franchised don't insist that the union not deal with other agents?

MR. LURIE: The agency agreement does say, but we --

QUESTION: Yes, so there is an agreement, whether you call it a conspiracy or not, that they won't deal with other agents who won't pay the franchise fee.

MR. LURIE: There is an agreement, if Your Honor please, but let me say, number one, that there is no evidence in this case that anybody or any agent who is prepared to meet and conform with the regulations cannot be licensed.

QUESTION: Would you think it would be different for purposes of the exemption if it were otherwise, that the union simply made an agreement with a group of agents not to deal with anybody else, even if they were willing to live up to all the rules?

MR. LURIE: Well, let me say that --

QUESTION: But is it any different?

MR. LURIE: Yes, I would think that that would change the situation. I don't think that situation could ever come about because it is the interest of Equity to have as many agents as possible, and have as many members represented by agents.

QUESTION: But that isn't this case, is it?

QUESTION: Well, that can't be true, because if that were true you'd allow commissions on scale, for people that have been on a scale.

MR. LURIE: Well, if Your Honor --

QUESTION: Because isn't it inevitably true that when you don't allow that to happen, there are fewer agents?

MR. LURIE: Well, I suppose that it is possible. There is certainly no evidence --

QUESTION: So it is not in your interest to maximize the number of agents.

MR. LURIE: If Your Honor please, there is no evidence in this case that I know of that any agent has ever been denied access -- has not come into the agency business because of that, or that any agent has ever dropped out because of that.

QUESTION: Well, but isn't it simple economics, as I suggested to your learned opponent, that if you cut off one

major source of income into the industry, namely, commissions on people who work at scale, and lots of people work at scale, don't they? There'll be less money available to pay agents and obviously there'll be fewer agents.

MR. LURIE: If Your Honor please, I think it is -- it's not in the record, but I think it's clear in the theatrical industry that people work for scale actors not because they want to. Indeed, there is no obligation on the part of any agent to take any actor on as client. They work for scale actors because they figure that if they catch Al Pacino when he's doing "The Indian Wants the Bronx" off Broadway, that several years later Al Pacino is going to be making a million dollars a picture and they're going to get ten percent of that. The fact of the matter is that although there may be some correlation between what you postulated, and I would say that logic probably supports it, there is no evidence to that effect, and further, that most of these agents do not work just in the theater. A lot of agents work in the theater, as he indicated, in the motion picture business, and in connection with radio and television.

QUESTION: I was questioning your argument that you desired to increase competition. I thought your argument is that you have a perfect legal right to suppress competition, because you're surely doing that.

MR. LURIE: Well, if Your Honor please, I didn't

say we didn't have a right to do this. I said, really what I was saying is that it is in the interest of Equity, and they do a balancing, just as this Court does often, between the problem of regulating the agents and protecting their members, and protecting them from abuses. You know, there was a lot of talk before that there were no abuses. Well, these regulations have been in effect since 1928, but the history of what happened prior to 1928 is replete with abuses.

In the Edelstein case in the 2nd Circuit, there were affidavits which indicated all sorts of problems including excessive commissions and so on. And what petitioner is arguing is that because these --

QUESTION: Wasn't that partly because this Court had then held that New York State couldn't regulate employment agencies, or agents?

MR. LURIE: Well, if your Honor please, first, what happened was that Equity in an effort to avoid the abuses which were so prevalent lobbied for the passage of the New York State law. When it was passed there were finding that it was not being effectively enforced. They found, for example, that under the New York State law it was quite easy for somebody, an agent, to say, well, when you sign with us you've got to give us a bonus. And if you get a job, we'd like you to give us a Christmas present. And this was -- in the record, the Joint Appendix here, you will see an excerpt from

"The Revolt of the Actors" which does state just that. It is also true that having found that under this Court's decision the Jersey law was not going to be enforced, and everybody thought it would apply to the New York law, then Equity really went to town and set up these regulations. But there were abuses before the regulations and to condemn or say something is not necessary because it succeeded in its objectives just doesn't make any sense.

QUESTION: May I just ask one more question. There's a question, what's an exorbitant commission? I guess in the view of the union, anytime an actor nets less than scale because he pays the commission, he pays an exorbitant commission.

MR. LURIE: If Your Honor please, there are two -- correct. Our position is that we have negotiated this contract and this scale for the actor. For example, traditionally, in the business, chorus kids, the chorus actors, never have commissioned an agent because there isn't anything an agent can do for them. They can't find access to jobs for them and they can't get them any more than the minimum in the collective bargaining agreement. That's it.

We think that anything which invades the minimum that we struggled to fight for and that we've gotten for them is excessive. We also think anything in excess of the regulations are excessive, and we feel that if we are within the

statutory exemption, that we have a right to set these rules.

QUESTION: Mr. Lurie, before you sit down, just as a matter of personal curiosity, how old a union is Equity?

MR. LURIE: Equity was formed around the turn of the century. It's about -- I think it was 1914 -- around -- that's not the turn -- around 1914, there was a group called the White Rats who organized the union. They were a bunch of actors who -- actors had been terribly depressed. I mean, without a union, the strange thing about this profession is that they beg you for the right to work for nothing, and one of the big struggles Equity has with its members is to say, you may not do this. They are so desperate to work. They are performers and they want to be seen.

QUESTION: Even Sarah Bernhardt had problems?

MR. LURIE: I'm afraid I'm not that old.

QUESTION: Has it always had the name, Equity?

MR. LURIE: Actors' Equity Association; I think so. They were originally called the White Rats, and that was the group that organized Equity.

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

ORAL ARGUMENT OF LAURENCE GOLD, ESQ.,

ON BEHALF OF THE AFL-CIO AS AMICUS CURIAE

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

All that Mr. Lurie has expressed indicates why all

of us on the union side of this issue believe that this case is controlled by Carroll. The Court in that instance addressed itself to the use of booking agents by musicians and the situation faced by all of the theatrical unions is roughly the same. It is a situation in which work is intermittent, in which there are many more competitors for jobs than there are jobs, and where the traditional pattern is that there is an intermediary between the purchaser of labor and those people who are offering themselves for employment.

QUESTION: Mr. Gold, what about the fact in Carroll that the orchestra leaders there actually played as musicians with the dance bands? Do you regard that as a distinction of no significance?

MR. GOLD: For the purpose here we think it is irrelevant because Carroll concerned many issues and one issue was the extent to which you could, to which the union could regulate the orchestra leaders. Another issue was the extent to which you could regulate booking agents and that booking agents question was dealt with separately. Indeed we think the question here is somewhat easier because all of the individuals who are in competition for these jobs are true employees. The question is whether when you have this two-step process of getting a job, first to get an agent and then to get the employment, the union is limited to only dealing with the person offering the job or can regulate that intermediary

stage, and we believe that if the union can only sign the collective agreement and get scale in this set-up where there is a two-step process, it can't do its job, because --

QUESTION: What about the emphasis that your brother Breindel puts on the collective bargaining agreement between the producers and Equity? We had nothing like that, of course, in Carroll.

MR. GOLD: That point is treated in the brief of the union, and the record in the Carroll case shows that there were collective agreements in the steady engagement field in Carroll, and that was covered by musicians' booking agents' rules just as the rest of the engagements were covered.

QUESTION: And Carroll made no distinction?

MR. GOLD: And Carroll made absolutely no distinction. This was the point that was at issue in this case. We believe that every one of the efforts that the petitioners make to distinguish Carroll fail.

QUESTION: What about the fee?

MR. GOLD: Well, my view on the fee is that if the rest of the system were in any way suspect that might not stand, but if we are correct that the whole point and purpose of the system is employee protective, we certainly believe that the fee which barely covers the cost of the system would be lawful.

QUESTION: Should be paid for by the --

MR. GOLD: In part. In part.

QUESTION: By the agents?

MR. GOLD: Let me -- you raised the question, Mr. Justice White and Mr. Justice Rehnquist --

QUESTION: That certainly wasn't covered by Carroll.

MR. GOLD: No, I would agree entirely. But the question was raised as to whether in a hiring hall situation the employer pays. The norm is that the employer pays.

QUESTION: When you say, if this system were suspect, the presence of the fee might render it --

MR. GOLD: No, no, Your Honor, I didn't mean to say that. What I meant to say was that if the system were otherwise no good, and I was trying to defend the charging of the fee for a system which was otherwise not in the labor exemption, I don't think I could succeed on that point standing alone. But I do argue to you that if the whole point and purpose of the system isn't proper under Carroll and within the labor exemption, I don't believe that the fact that the cost of the system is shared by the union and the employer invalidates the system or even invalidates that one provision any more than I believe that a perfectly lawful hiring hall could possibly be invalidated under the long-standing practice that it's the employer who pays the cost of the hall either in whole or in part.

QUESTION: But here the employer doesn't --

MR. GOLD: Because if it's the employer who pays, or it isn't the agents who pay in this instance, then it's the members who pay. And that ultimately is subject, if you're in the labor market area, which is settled by the back-and-forth between the varying groups depending on their economic strength and not by the law.

QUESTION: Mr. Gold, I'm just curious. Here we are dealing in the labor, at least we're dealing with jobs. Suppose the union and its members simply announced that none of the members of this union will deal with any attorneys who charge more than X dollars an hour. We'll deal with anybody who will, but we just won't deal with anybody who won't -- who charge any more. Or doctors, that they have to -- we'll deal with them if they have a satisfactory scale. That may not violate the antitrust laws but would it be within the labor agreement?

MR. GOLD: I'm not positive where the line is but I can indicate what we think the theory is, and what we understand the basic point of the labor exemption to be. It seems to us that the basic point of the labor exemption is that there are two different systems that Congress has decreed. One is the antitrust system which regulates product markets, and business markets in general. The other is a system where employees are permitted to combine to protect themselves against job and wage competition in the labor

market.

QUESTION: And in my example, that's not the labor market.

MR. GOLD: It would seem to me that was certainly stretching the concept of the employees' labor market to its very end.

QUESTION: It may not violate the antitrust laws but it does --

MR. GOLD: That's correct, but in this instance what we rely on very heavily is that we're in the heart and soul of these employees' job market. The findings are that the agent stands between the employee and the job. He is the means. In that situation we believe that no matter how you cut this, whether you do it under the statutory exemption or you do it under the non-statutory exemption, that the union is regulating the matter of immediate and direct concern.

QUESTION: Actually, neither are express statutory exemptions. They are referred to in the terminology of --

MR. GOLD: We think they're all express. Congress has been at this for some time. There's Section 6; there's Section 2.

QUESTION: One is no more express than the other, though?

MR. GOLD: No. They are equal. I guess I would

put that affirmatively that they are equally, but plainly as Mr. Justice Frankfurter said in Hutcheson and as Mr. Justice Powell said in Connell, the basic task here is harmonizing these two different systems, reading these series of laws together in a way that makes sense, and the basic point that we think has emerged from all of that jurisprudence is that if the union is regulating the matter of direct and immediate concern and its employees' job market, that is within the labor exemption, obviously.

QUESTION: Well, do you say the same, Mr. Gold, if access was limited here, if only a selected group of agents were franchised?

MR. GOLD: That depends on the test you apply to determine what the meaning of the labor exemption is. It's not absolutely plain that the labor exemption permits unions to do absolutely anything.

QUESTION: I agree with you but now suppose the agents have -- what's their organization?

MR. GOLD: TARA.

QUESTION:: TARA. They have an agreement with Equity and only TARA members can deal.

MR. GOLD: I think we would have to show that the union was operating to advance a direct and immediate interest. I don't know how, on the facts you give we would possibly show it. The point though is that if we are operating to

advance a direct and immediate interest, it appears to us that the fact that there is an effect on a business market cannot be sufficient to invalidate our system because if that's true, then there's nothing left of Congress's determination that the labor market can be regulated in this way. There'll always be an effect. The Jewel Tea --

QUESTION: Mr. Gold, before you sit down, you touched upon this distinction between focusing on the labor market and on the other hand, on the product market. Has this Court ever in so many words up to this point made that distinction in focus?

MR. GOLD: Yes. I can think of at least two occasions on which it's been made, one of which was alluded to from the bench. Mr. Justice White's opinion in Jewel Tea has been the theme on which I've been addressing variations. I also --

QUESTION: Does his opinion really make that distinction? He said even in the product market it's still all right, within the exemption, if it's the least restrictive possibility, as I read it.

MR. GOLD: I read his opinion to say, if the issue is of direct and immediate union concern, and there the direct and immediate union labor market concern was the desire of those employees not to work at night; the fact that there is also an effect on the product market is not sufficient.

And then the contrast is if you regulate the product market directly with the hope that you will get some benefit eventually, and the example would be that given in Pennington, where the union hoped to regulate the product market in terms of who would enter and who would not in the hope that eventually it could get higher wages.

The example I just gave is an instance, and Allen Bradley would be another, where the union is outside the labor exemption. We believe the test for determining when it's inside the labor exemption is basically that I've just articulated, that the fact that there's a consequential effect or an effect on the product market is not enough to defeat the exemption.

QUESTION: Mr. Gold, what is your second case?

QUESTION: -- there's recent academic commentary to this effect that seems to be emerging.

MR. GOLD: I think that some of the academic commentary doesn't do the opinions justice, necessarily --

QUESTION: Mr. Gold, I wanted to ask perhaps two questions.

MR. GOLD: -- I was going to say that Mr. Justice Powell's opinion for the Court in that case, he notes that the center of the labor exemption is where the union is attempting to regulate in order to prevent wage and job competition among its members in its labor market, and we think that that's important. After all, the exemption --

QUESTION: The question, I guess, then, is whether the agents are in -- in which market are the agents placed?

MR. GOLD: Well, you're going to have, in effect -- we make an argument, it's point two of our amicus brief, that an agent because he deals in the services of employees doesn't really have a product market in the classic sense. But as Jewel Tea shows, you can regulate in the labor market and that has an effect on the product market as well; they intersect and we think the exemption, our labor exemption does not require that we show that there's no effect on the product market, because if we had to show that we really have to defend ourselves on the merits against the antitrust claim. After all, if there's no effect on the product market there's no restraint on trade. We think what -- it's sufficient, given these two schemes, if we show we're staying in our basic area, and there are only consequences.

QUESTION: Thank you.

MR. GOLD: Thank you very much.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Breindel?

MR. BREINDEL: Yes.

MR. CHIEF JUSTICE BURGER: You have one minute left.

ORAL ARGUMENT OF HOWARD BREINDEL, ESQ.,

ON BEHALF OF THE PETITIONERS -- REBUTTAL

MR. BREINDEL: Very briefly, in connection with

Mr. Lurie's statement that there was no --

MR. CHIEF JUSTICE BURGER: You'd better get over to the microphone, there.

MR. BREINDEL: In connection with Mr. Lurie's statement that there was no evidence in the record that he was aware of that agents are leaving the field or are reluctant to enter it, let me quote from page 196 of the Joint Appendix, which is a letter from the president of TARA to Equity. TARA's president said this: "Many of our members" -- that is, the agents -- "doubt whether they can long continue in the field. Without naming names, we all know that many fine and trusted agents have deserted the ranks, either going into other fields such as personal management or moving to the West Coast. Many of those who function now in the field of Equity get their living from other sources such as commercials, other motion picture deals, and so forth. Other agents have had to give up their independence and merge with bigger offices, but even the big and powerful agencies find it now unprofitable to handle work in the theater, especially the representation of the average income-earning Equity member." Thank you.

QUESTION: Could I ask you one -- do you think all decisions to move from New York to the West coast are motivated by Actors' Equity practices?

MR. BREINDEL: No, I don't.

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

(Whereupon, at 2:03 o'clock p.m., the case in the above-entitled matter was submitted.)

CERTIFICATE

North American Reporting hereby certifies that the attached pages represent an accurate transcript of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

No. 80-348

H. A. ARTISTS & ASSOCIATES, INC., ET AL.

V.

ACTORS' EQUITY ASSOCIATION ET AL.

and that these pages constitute the original transcript of the proceedings for the records of the Court.

BY: Gail T. Gibson