ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-1966

TITLE BELKNAP, INC., Petitioner
v. DUWAINE E. HALE, ET AL

PLACE Washington, D. C.

DATE January 11, 1983

PAGES 1 - 50

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IN THE SUPREME COURT OF THE UNITED STATES

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BELKNAP, INC.,

Petitioner

v. : No. 81-1966

DUWAINE E. HALE, ET AL.

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Washington, D.C.

Tuesday, January 11, 1983

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:14 p.m.

APPEARANCES:

LARRY E. FORRESTER, ESQ., Atlanta, Georgia; on behalf of the Petitioner.

SAMUEL A. ALITO, JR. ESQ., Office of the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the National Labor Relations Board as amicus curiae.

CECIL DAVENPORT, ESQ., Louisville, Kentucky; on behalf of Respondents.

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C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in the case of Belknap, Incorporated, versus Duwaine E. Hale, et al. Mr. Forrester, you may proceed whenever you're ready.

ORAL ARGUMENT OF LARRY E. FORRESTER, ESQ.,
ON BEHALF OF PETITIONER BELKNAP, INC.

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

In January of 1978 the Petitioner Belknap employed approximately 400 people in a bargaining unit represented by the Teamsters Union. On February 1st of 1978 the Teamsters called a strike of the bargaining unit because the parties were unable to agree upon the terms of a new collective bargaining agreement. On that same date Belknap advertised in the local newspaper for permanent replacements for these striking employees. Simultaneously, Belknap implemented an across the board wage increase for all employees in the bargaining unit.

During the course of the strike there were unfair labor practice charges filed against Belknap and by Belknap against the union for conduct occurring on the picket line. In April of 1978 the National Labor Relations Board issued a complaint against Belknap, contending that their unilateral wage increase at the

inception of the strike was an unfair labor practice and that it violated Belknap's duty to bargain with the union.

In July of that year, before a hearing on these unfair labor practice matters before the Labor Board occurred, the regional director for the Labor Board in Cincinnati directed the parties to the labor dispute to attend a meeting at the regional's office in Cincinnati and encouraged the parties to resume negotiations to resolve the labor dispute. As a result of this meeting, concessions were made by both parties concerning the terms of their collective bargaining agreement. There were compromises made by the union and by the employer.

The ultimate issue between the parties that separated them was the status of the strikers vis a vis the status of the strike replacements. It was Belknap's position that the strike replacements would be retained. The union, of course, contended that the strikers should be returned to work. The parties were unable to make an agreement on this issue.

The regional director for the Labor Board suggested a compromise whereby Belknap would agree to recall 35 striking employees per month, even though this may require that the replacement employees be laid off.

On the basis of this compromise, the parties reached a strike settlement agreement and settled the strike. Part and parcel of this settlement was the withdrawal of unfair labor practice charges by Belknap and by the Teamsters Union. Also, related state court litigation concerning strike violence during the course of the strike was dismissed. All pending litigation was dismissed in conjunction with the strike settlement agreement.

After this settlement agreement was consummated, the replacements, represented by Respondents herein, sued in state court, contending that their layoff occasioned by the terms of the strike settlement agreement constituted breaches of state law concerning misrepresentation with regard to offering them permanent employment in the first place, and also breaches of contract with regard to terminating their employment after they had been offered permanent employment.

The trial court dismissed these state claims upon the grounds that they were preempted by the National Labor Relations Act. The Court of Appeals of Kentucky reversed, contending that the subject matter concerned a matter of compelling state interest and was of only peripheral concern to the National Labor

Relations Board.

The Supreme Court of Kentucky ultimately denied discretionary review, and it raises the issue for this Court whether or not the state court claims are preempted under the National Labor Relations Act.

QUESTION: Mr. Forrester, may I ask, do you know of any cases in which an action for failure properly to represent has been brought against a union by strike replacements?

MR. FORRESTER: I know of no such case, Justice Brennan.

QUESTION: Neither Board nor state court or federal court?

MR. FORRESTER: I know of no such case.

QUESTION: Yes.

QUESTION: At that point the union -- did it owe any duties to anybody in the bargaining unit at that point?

MR. FORRESTER: The union owed the duty of fair representation to all members of the bargaining unit. Strike replacements are of course members --

QUESTION: But wasn't this in connection with negotiating a new agreement?

MR. FORRESTER: Yes. Regardless of the existence of a collective bargaining agreement, the

union owes duties to everybody in the bargaining unit.

QUESTION: Well, even people who are hired as replacements?

MR. FORRESTER: Replacements have to be considered members of a bargaining unit if they are -- they stand in the stead of the strikers. The union represents everyone in the bargaining unit.

QUESTION: And yet, Mr. Forrester, how is this striking union ever going to meet that duty? If it exercises or discharges it in favor of the strike replacements, then isn't it denying fair representation to the strikers?

MR. FORRESTER: Well, there is certainly a conflict among the strikers and the replacement workers. But the --

QUESTION: Well, that's why I wonder. I've just never heard of a suit by strike replacements.

QUESTION: Well, this is -- was there a suit against the union?

MR. FORRESTER: There was no suit against the union by the strike replacements.

QUESTION: Not here, though. Not here. I mean, this suit is against --

MR. FORRESTER: This suit is against Belknap.

QUESTION: Yes, against the company.

MR. FORRESTER: That's correct.

QUESTION: Well, when these people were hired was there any kind of a contract that would preclude their being discharged, with or without cause?

MR. FORRESTER: There was no such contract. Belknap had to characterize their replacement status as permanent in order to comply with the requirements of federal law.

QUESTION: Well, they did make the promise --

MR. FORRESTER: They did make the promise.

QUESTION: -- you're going to be a permanent employee.

QUESTION: And they reiterated it.

MR. FORRESTER: They did reiterate it.

QUESTION: And they also alleged fraud.

MR. FORRESTER: They did allege fraud, but that was not the basis upon which the Court of Appeals determined that they could sue in state court. The Court of Appeals said, by merely saying that you promised them permanent replacement status and then entering in a strike settlement agreement permitting them to be discharged --

QUESTION: You've broken your contract.

MR. FORRESTER: -- they've stated a cause of action.

Under federal law, however, if we do not characterize their status as permanent, then we may not assert their employment status against any striker who desires to return at any time, and for that reason we are --

QUESTION: Well, but you don't -- that doesn't -- that's just a privilege. That isn't an obligation which you have to --

MR. FORRESTER: Well, it's a substantial economic weapon.

QUESTION: Well, it may be, but you're not obliged to, in hiring replacements, to say they're going to be permanent.

MR. FORRESTER: Well, we are privileged to do so under Mackay Radio.

QUESTION: All right, you're privileged, but you're not obligated to.

MR. FORRESTER: And if we do not so characterize it, we do not have that economic weapon.

QUESTION: Supposing, Mr. Forrester, that an employer in the midst of what he knows is an unfair labor practice strike wants to get replacement workers, and suppose he gives each of the replacement workers two-year contracts. That's what he tells them, anyway, although he may know in the back of his mind that he may

have to reinstate the strikers by some sort of a compromise settlement such as worked out here.

Does the enforcement in state court by the replacement workers of that two-year contract -- how does that, arguably or otherwise, interfere with the National Labor Relations Act?

MR. FORRESTER: Well, I suggest that a state court's inquiry into the subjective motivation of an employer in those circumstances substantially interferes with the line of preemption cases that permit employers and labor unions to resort to economic weapons whenever there's a labor dispute.

QUESTION: Well, it doesn't permit employers to resort to fraud or breach of contract, though, in dealing with a group of employees.

MR. FORRESTER: I agree that it does not permit that, Justice Rehnquist. But -- nor are states permitted to inquire about employer motivations or union motivations in exercising their economic weapons without the risk of damaging the worth of these economic weapons in a labor dispute.

QUESTION: You say, then, that a replacement worker who is hired by the employer, the employer in his own mind knows, I am probably going to have to let this guy go in about three months but I really need him, so

I'm going to tell him he can have the job for two years because he's got a job now and he wouldn't leave it if I told him it was just for three months, you're saying that that employee has no cause of action, tort or contract, when he is discharged after three months, in state court?

MR. FORRESTER: Promises of that sort may conceivably be unfair labor practices, inasmuch as the employer continues to have the duty to bargain with the representative concerning --

QUESTION: Yes, but my question was, can this employee sue in state court for fraud or for breach of contract?

MR. FORRESTER: It is our position that he cannot.

QUESTION: How does that interfere with the National Labor Relations Act?

MR. FORRESTER: Because whenever a state court is permitted to inquire into the subjective motivations of an employer for offering permanent replacement status, then the damage to that economic weapon is done.

QUESTION: What is subjective about a contract of employment of two years?

MR. FORRESTER: It's the intention of the

employer with regard to that contract. Justice Rehnquist was suggesting that --

QUESTION: Under the hypothesis that Justice Rehnquist gave you, I thought he was just talking about a flat-out contract for two years.

MR. FORRESTER: I thought Justice Rehnquist was suggesting that the employer knew that it was an unfair labor practice strike and he could not reasonably offer that employment contract.

QUESTION: That might come into play, but he's made them a -- there's nothing subjective or ambiguous about an employment contract for two years, is there?

MR. FORRESTER: There is not, Mr. Chief Justice.

QUESTION: Then why can't that be enforced in state courts?

MR. FORRESTER: Because any such contract which would be in derogation of a collective bargaining agreement is not enforceable. It's the collective bargaining agreement that prevails over any individual contract.

QUESTION: How is that in derogation of the collective bargaining agreement?

MR. FORRESTER: Well, the employer -- let's assume the employer enters a contract for two years as

you suggest, and subsequently negotiates the terms and conditions for that unit. Then the promise of a two-year contract goes by the wayside.

QUESTION: Could I ask you, suppose there hadn't been a settlement, but the employer held out and the strike -- he just broke the strike by hiring these replacements, all of whom he promised permanent jobs to, and so the strike was over. And then he started firing these people he had promised as permanent replacements.

MR. FORRESTER: Well, in the context of this case the Board would have pursued the unfair labor practice.

QUESTION: No, but let's just assume no unfair labor practice. Nobody'd even filed one. It was just an economic strike and the employer won. He hired permanent replacements and then he decided that, now that he's hired them all, he'd like to take back some of the old workers because they were better. So he just fires the -- do you think he could do that?

MR. FORRESTER: There may be a cause of action, depending on state law.

QUESTION: What do you mean, may be? It's either yes or no. If it's preempted one way, it's preempted the other, it seems to me. What you're really saying is that giving them a remedy for breach of

contract burdens the employer's right to hire replacements. If he knows he's going to have to pay for his promise, he won't be so free to make them, and that burdens his right to hire replacements. That has to be your argument, and it's also the Board's argument, I take it.

MR. FORRESTER: The argument is that he will be effectively deprived of the economic weapon of offering permanent employment status to strike replacements.

QUESTION: You mean lying about it. Yes, he's going to be deprived of the right to break his contract.

MR. FORRESTER: I suggest that the likelihood of an employer --

QUESTION: That is an interesting piece of a protected activity.

MR. FORRESTER: I suggest that the likelihood of an employer being in a position to cynically predict down the road what is going to happen in a labor dispute is not great.

QUESTION: It isn't cynically, but all he would have to do to protect himself, and he may not be able to hire replacements, but he would have to say: Look, this is certainly my promise to you: I'll keep

you if I can, but if it turns out that I've got an unfair labor practice charge made out against me I'm going to have to can you.

That maybe is a big burden, but I'm not sure how much it is. Apparently the Board thinks it's a big burden, and so do you.

MR. FORRESTER: I do, and the problem arises either in that context or another: Once an employer determines to hire permanent replacements, he continues to have the obligation to bargain with the union about the terms and conditions of employment for members of the bargaining unit. An employer would be substantially disinclined to make that --

QUESTION: Well, he doesn't if he wins the strike and he's hired replacements who aren't a member of the union.

MR. FORRESTER: If the strike is over and no bargaining obligation continues, he is relieved of that risk and that responsibility and the mandate under the Federal Labor Act.

QUESTION: It's your position that in order to really deal with the union and fight his battle during the strike, all bets are off so far as other areas of the law are concerned, really. The employer is free to defraud people or to breach contracts with third parties

so far as the beginning of the strike is concerned, in order that he can concentrate his maximum effort with the least possible financial burden on the union, or on the employer?

MR. FORRESTER: Obviously, there is some sort of egregious conduct that should be subject to state law.

QUESTION: Well, how about fraud?

MR. FORRESTER: In the context of this case, I do not believe that was an element.

QUESTION: Well, what about just straight contract? Sure, the employer is free to use economic weapons, but why shouldn't you say he is free to use those economic weapons that are within the law? And certainly promising somebody, somebody a two-year job, knowing that you're going to can him if you make a settlement, why shouldn't he have to pay for breaking his contract?

MR. FORRESTER: Well, in this case there were no two-year contracts.

QUESTION: Well, it was even worse. There was the promise of permanent employment.

MR. FORRESTER: As is required in order for an employer to preserve that economic weapon.

QUESTION: Not required. It's just your

privilege.

QUESTION: Has there been any judicial determination with respect to whether there was or was not a contract here?

MR. FORRESTER: There has not been.

QUESTION: The case hasn't been tried yet on the state claim?

MR. FORRESTER: It has not been tried yet.

QUESTION: Yes, but as the case comes to us, the case is presented to us, there was a promise of permanent employment.

MR. FORRESTER: There was a promise of --

QUESTION: And reiterated.

MR. FORRESTER: And reiterated.

QUESTION: You concede that?

MR. FORRESTER: I do concede that, Justice White.

If the employer had not done so, then he would not have been able to assert the rights of the permanent replacements against the striking employees.

QUESTION: We all understand that. But the law didn't require him to make that promise.

MR. FORRESTER: No. It permitted him to do so.

QUESTION: We have to proceed on the

assumption that there is a probability or a possibility that a contract will be established in the proceedings in the future.

MR. FORRESTER: If there is a contract in the proceedings in the future, it is of course in contrast with a collective bargaining agreement that covers the same terms and conditions of employment.

QUESTION: Well, anything to prevent a person from making inconsistent contracts with two different people at the same time?

MR. FORRESTER: No, Mr. Chief Justice, there is nothing to prohibit it.

QUESTION: If he breaches one of them, then he's going to be liable on that one.

MR. FORRESTER: But a collective bargaining agreement always prevails over any individual employment understandings between an employee and his employer.

QUESTION: You don't say that this is preempted because there's any -- that the employer was doing something that was expressly prohibited or permitted, protected by the Act in the normal sense of the word? You're just saying this is an area in which Congress said the state law should stay out of because you ought to let these two people fight it out in the trenches just by any weapons they want, as Justice

Rehnquist said? That's your position, isn't it?

MR. FORRESTER: Not entirely, Justice White.

QUESTION: What is the unfair labor practice --

MR. FORRESTER: If as a matter of law, as the Labor Board contended, that the strike was converted to an unfair labor practice strike with the offer of the wage increase on the 1st of February, then the mere offering of permanent employment to replacement strikers according to the Labor Board is an unfair labor practice.

QUESTION: Had the unfair labor practice proceeding continued to attend, you're -- and you'd been found guilty of an unfair labor practice, you may have been subject to an order of the Board to reinstate the strikers?

MR. FORRESTER: The Regional Director so advised Belknap in their conference where the issues were settled.

QUESTION: Even after you had made the promises of permanent employment to the replacements?

MR. FORRESTER: That's correct.

QUESTION: Let's assume that's -- let's assume that's so. That still leaves the question of the people that the employer promised to hire permanently; and what

has the Board got to do with that? Zero.

MR. FORRESTER: Well, it's unlikely that the Board has unfair labor practice jurisdiction to entertain claims of --

QUESTION: They couldn't possibly give a remedy --

MR. FORRESTER: Unless --

QUESTION: -- to the permanent employees, could they, to the permanent replacements? There's just no remedy they could give them.

MR. FORRESTER: They certainly would not be entitled to remedies that would be a satisfactory state court claim.

QUESTION: Well, that really doesn't -- you're not suggesting that there's any -- that the employer was even arguably committing an unfair labor practice with respect to the permanent employees that he said he was hiring, or the permanent replacements?

MR. FORRESTER: If in fact and in law it were an unfair labor practice at the time these offers were made, then the Board's position is that it's an unfair labor practice to offer permanent employment status to replacements.

QUESTION: Well, it may be, it may be. But it's not -- say one of the permanent replacements,

so-called permanent replacements, came in and filed a charge with the Regional Director or the General Counsel that, this employer is committing an unfair labor practice against me. He'd be laughed out of the room, wouldn't he? Not laughed; he'd just say, sorry, take this down to the state court and file your suit down there.

MR. FORRESTER: I'm not sure the Labor Board would say that, but it's unlikely a replacement would file such a charge.

QUESTION: Exactly, yes.

QUESTION: Mr. Forrester, may I ask you a question. There's an issue, isn't there, as to whether it was an unfair labor practice strike or an economic strike at the time of the hiring of the permanent replacements?

MR. FORRESTER: The issue had been raised. I don't know at the time that the bulk of the replacements were hired that the charge had been filed on the unilateral increase.

QUESTION: I'm just wondering if the character of the strike would have any impact on your preemption argument, because one kind of strike might give rise to an arguable violation and another kind of strike might not. And if that's true and if we don't yet know until

the trial is had what kind of a strike it is, is it perfectly clear we have a final judgment?

MR. FORRESTER: Well, it is clear that the federal issue is decided.

QUESTION: You don't think the federal issue could be affected by any of the proceedings that take place hereafter?

MR. FORRESTER: The only issue that would be subject to exploration with regard to these claims is any question of fraud underlying an employer's motivation in offering permanent employment. I suggest that once the state court is permitted to make that inquiry in the context of a labor dispute, then the harm is done, because any state in the -- any court in this union whenever permanent replacements are hired may inquire as to what the employer intended and there is no longer any federal privilege as we understand it now to hire permanent replacements without risk of being sued in state court for fraud.

CHIEF JUSTICE BURGER: Your time has expired.

MR. FORRESTER: Thank you, Mr. Chief Justice.

CHIEF JUSTICE BURGER: Mr. Alito.

ORAL ARGUMENT OF SAMUEL A. ALITO, JR.,
ON BEHALF OF THE NATIONAL LABOR
RELATIONS BOARD, AS AMICUS CURIAE

MR. ALITO: Mr. Chief Justice and may it please the court:

The National Labor Relations Board agrees that Respondents' state claims are preempted by federal law. We reach this conclusion primarily because those claims would frustrate the policy of federal labor law by interfering to an impermissible degree with one of the chief economic weapons granted to employers in labor disputes, that is, the right to hire permanent strike replacements --

QUESTION: The right to be dishonest in the process or what?

MR. ALITO: No, Your Honor, I don't think this case involves any dishonesty on the part --

QUESTION: The right to promise -- the right to make a contractual promise that he knows he may not be able to keep?

MR. ALITO: An employer certainly does not have that right under federal law, but it may be that, and we contend that it is, it is the case --

QUESTION: You say that he may be able to make this promise, which the federal law may prevent him from keeping, and yet he is not liable for his promise to somebody else, which is probably or perhaps has enticed somebody to leave another job?

MR. ALITO: Well, Your Honor, we maintain that suits like the present one are preempted. But I think it's misleading to suggest that employers can engage in fraudulent conduct towards strike replacements.

QUESTION: Well, I don't -- let's don't talk about fraud, then. Just talk about contractual promises. You say they are free to make a promise that the federal law may keep -- prevent them from keeping. Of course, the federal law doesn't prevent them from keeping it. They can just pay up for their promise. They just stand like anybody else in life does; if he breaks his contract he pays damages. He can reinstate the workers like the federal law requires him to do.

Why should he not make somebody whole that he has damaged?

MR. ALITO: Well, Your Honor, let me make several points in response to that. First, it is not -- it is not a false promise for an employer in this context to state to a strike replacement that he is going to be given the position of a so-called permanent replacement. That is --

QUESTION: Well, let's say it wasn't false. It was certainly erroneous, was it not?

MR. ALITO: I don't believe it was erroneous, Your Honor. It is a term of art in federal labor law.

QUESTION: Oh, so you're saying anybody who has had that promise shouldn't win his case because he hasn't been promised anything?

MR. ALITO: Well, that might be the case. What we are -- that might also be the case.

QUESTION: Well, that's what you've just argued.

MR. ALITO: Well, what I'm saying is that in this case there was no -- there was no fraud on the strike replacements.

QUESTION: Mr. Alito, are you familiar with the opinion of the Kentucky Court of Appeals in this case?

MR. ALITO: Yes, I am.

QUESTION: Well, in the second paragraph, which you will find, I believe, on page 1 of the appendices to the petition, after the beginning of the paragraph cites the names of the parties, it says, "The action alleged fraud, misrepresentation and breach of contract."

Was the Kentucky Court of Appeals wrong in describing the action that had been filed in the Kentucky trial court?

MR. ALITO: Absolutely not, Your Honor. But if you look at the complaint and you see what the basis

for the fraud claim was and the basis for the contractual claim, you will see that the basis for the fraud claim, and as far as we can determine the sole basis for the fraud claim, is the advertisement that Belknap placed in the newspaper. That is reproduced as an appendix to the brief we submitted at the petition stage.

QUESTION: Well, does Kentucky have the same sort of rules of procedure that the federal courts do, do you know?

MR. ALITO: I don't know, Your Honor.

QUESTION: If it does, certainly any number of amounts of evidence or theories could be adduced in support of a pleading of fraud. You don't have to -- you're not limited to a particular advertisement. Why shouldn't the state courts have the right to find out what the case is about?

Apparently you concede that many kinds of fraud would be actionable in state court, don't you?

MR. ALITO: Well, I don't want to belabor the characterization of the facts of the case. I simply wanted to point out that it is a bit misleading to suggest that this case, which we believe is typical, is an instance in which an employer is even alleged to have engaged in what is really fraudulent conduct.

QUESTION: Well, then you do say that the Kentucky Court of Appeals was wrong when it described this action as alleging fraud, misrepresentation and breach of contract.

MR. ALITO: I don't disagree with their characterization of what was alleged. I think it is apparent, however, from the face of the complaint that what is really at issue is the right to offer "permanent placements to strike replacements." And that is precisely what this Court said an employer could do in an economic strike.

QUESTION: Certainly he could do that. Of course he can do that.

QUESTION: That doesn't mean he's not liable if he breaches --

QUESTION: What remedy do the Respondents have under federal law if they have no remedy in state court?

MR. ALITO: Your Honor, there is one possible remedy. It was touched on this morning. It's the filing of a claim against the union for breach of the duty of fair representation. I don't want to --

QUESTION: You don't seriously argue that the union has a duty to represent the replacements, do you, Mr. Alito?

MR. ALITO: We contend that they have a duty to represent them in certain respects.

But the point that I really want to make in response to that question is that the filing of unfair labor practice charges by a union in any instance in which an employer promises more than federal law permits, and therefore more than he will be able to deliver, will probably prompt the union to file unfair labor practice charges and that will serve to police these offers by employers to permanent strike replacements.

QUESTION: Well, your position must be that no suit in the state courts in these circumstances may be maintained, whether it's for fraud, misrepresentation, breach of contract or anything else.

MR. ALITO: That is our position, Your Honor. It's been suggested that the employer has a duty to provide some sort of explanation to the strike replacements as to what their status is, to tell them something more than that they are being employed as so-called permanent strike replacements. And from our point of view that would be unworkable and really intolerable, if an employer were required to supply a prospective strike replacement with an accurate, comprehensive, understandable synopsis of the rights of

strike replacements and strikers and employers in economic strikes and unfair labor practice strikes.

The risk of misstatement, the risk that a state court would find that there had been misstatement, would be so great that the employers' use of this permitted economic weapon of hiring permanent strike replacements would be grievously impaired. And it is for that reason that we maintain that employers are permitted to offer strike replacements permanent employment, as this Court has held.

QUESTION: What's your answer to my question I asked your colleague: If it's not an unfair labor practice strike, there's no charges filed like that, the strike is over, the employer has won it. He has promised permanent employment to replacements and then he cans them.

MR. ALITO: I see that as a different question, Your Honor --

QUESTION: Why?

MR. ALITO: -- because it does not interfere --

QUESTION: Why?

MR. ALITO: Because the strike is over, for that very reason.

QUESTION: Well, I know. But knowing that he

can't fire them will dampen his ability to offer permanent replacement status to people during a strike.

MR. ALITO: Well, Justice White, in answer to that question and another question that was asked when Mr. Forrester was speaking, we certainly don't maintain that employers are given carte blanche and are absolutely free from the constraints of state law to promise anything to anybody in the name of maintaining an economic weapon during a labor dispute. And I think that is analogous to a fraudulent promise to a third party.

QUESTION: So suppose there are unfair labor practice charges filed by the union, who claim that he committed unfair labor practice and that he's offering permanent replacements to people that he has no business offering them to. And they litigate that and it's found that the employer's committed nothing, no unfair labor practice at all. He was quite permitted to offer these permanent replacements. And then he fires them.

MR. ALITO: Your Honor, I think my answer to that question is that that is a different case, because when the strike is over there is not the same degree of interference with a permitted economic weapon.

QUESTION: Well, the strike is over now. The strike is over now by a settlement, and he fires the

replacements.

MR. ALITO: Well, future strikes --

QUESTION: It's all over.

MR. ALITO: Future strikes are not over, and if it is known that state actions like this one are permitted there will be an intolerable degree of interference with an employer's economic weapon.

QUESTION: Let me test your position with a slight hypothetical change here. Suppose, since many people are reluctant to break a picket line, the employer had announced in that announcement that's in your appendix here a $500 premium, special payment, will be made for all replacements. And then when they get there they negotiate and agree that the $500 payment will be deferred, but they all go to work just as they did here.

And then the employer doesn't pay the $500, independent of whether he's fired them or not. Could they sue for that $500 in state court?

MR. ALITO: I believe that would be preempted on the same theory. I think that certainly involves conduct that is arguably prohibited by Section 8 and would be preempted under the Garmon rule.

QUESTION: You don't know of any other cases like this, where you just say it's just one of those

areas a state court should stay out of, it isn't specifically arguably prohibited or protected?

MR. ALITO: Machinists is certainly comparable to this in many respects. That was the case where Congress' intent not to permit state regulation was inferred from the fact that burdening a particular economic weapon would frustrate the policies of the Act. And that we contend is what would happen here.

Thank you.

CHIEF JUSTICE BURGER: Mr. Davenport.

ORAL ARGUMENT OF CECIL DAVENPORT, ESQ.,

ON BEHALF OF RESPONDENTS

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

Let me answer a couple of inquiries if I may. The rules of procedure in the State of Kentucky are paraphrased in 1954 from the Federal Rules and with very few exceptions are the same. And this was a motion for summary judgment, which is the same as it is under the Federal Rules, or the interpretation is the same in Kentucky. And this was therefore an appeal from that summary judgment of the Jefferson Circuit Court.

This case was first removed to U.S. district court, then remanded back to state court, then upon a motion for summary judgment, before very little proof

was taken -- only one deposition had been taken -- to test the pleadings and test the law, the motion for a summary judgment was made. It was sustained in the Jefferson Circuit Court and thereupon it was appealed to our Court of Appeals.

Our Court of Appeals reversed the Jefferson Circuit Court and held in the opinion that has been referred to that it was only a peripheral concern to the national scene and the national Act.

I believe the thing that bothered me concerning this case, and it's bothered me for some couple of years since we have been going through this process, and I think that was finally answered here today, and I feel more at ease. In our bowing down to the holy grail of National Labor Relations Board preemption and unusual policy of handling labor law, we have lost sight of the very most important thing, and that is the 400 replacements.

What happens to them? Do they fall through the crack in philosophical theories of the best way for the best and largest good to handle the overall peace?

QUESTION: Mr. Davenport, could I ask you, suppose the federal labor law said that in a strike, during a strike until it's -- at least up until a certain point in a strike, an employer may hire

replacements, but he may not hire anybody on a permanent basis. Just suppose the federal law said that.

Then the employer nevertheless, in hiring replacements, promises a permanent job. Now, you wouldn't say that that contract would be enforceable if it's just -- if it's an illegal contract, would you?

MR. DAVENPORT: No, because it would have been preempted by the federal Act.

QUESTION: Well, it was just made an illegal contract.

MR. DAVENPORT: That is correct.

QUESTION: Well, as I understand the submission on the other side here, that when an unfair labor practice charge is pending such as was pending in this case, it really was an unfair practice, namely, contrary to federal law to promise a permanent job, in which event if that -- assume that it turned out that way, that, true, there was an unfair practice and the employer should not run around hiring permanent replacements.

Now, it's tough on the 400 replacements, but nevertheless they made an illegal contract with the employer.

MR. DAVENPORT: Justice White, I could be wrong, but the statement was made earlier by my

colleague that this was a violation. I submit that it is a violation to give a raise, but it is not -- and I cannot recall any case that ever spoke of making promises to replacement employees being a violation and an unfair labor practice.

QUESTION: As a matter of fact, the argument is that the right that's being protected here is the right to promise permanent --

MR. DAVENPORT: That is correct. And again, I'd like to reiterate, it is an unfair labor practice to give a blanket raise because that is inducement to the outside to come in and an unfair economic weapon, if you will. But I know of no case that ever spoke of the types of promises that can be made to replacement employees being an unfair labor practice.

QUESTION: How do you distinguish in terms of inducement the promise to give permanent employment and an offer to give an increased wage to the replacement people? What's the difference?

MR. DAVENPORT: Well, apparently under the overall policy and regulations laid down by the Board, the offer of a wage is an unfair inducement to entice off the picket line those back in. But the hiring of replacement employees per se would not likewise be an inducement. I mean, it might be a threat to them, but

it is certainly not an inducement.

What we have here is attempting to broaden the scope and the jurisdiction of the National Labor Relations Board under the guise of the broad terms "arguably protected" or under the broad terms of the necessity to give economic weapons and create a detente, so to speak, a philosophical theory of governing the labor peace.

Now, this has been going on for a long time. But it is inconceivable to us that in this process, if the theory of the NLRB were taken and if it were sanctioned by this Court, it is inconceivable that there could be 400 people in these United States that would not be treated in the same substantial fashion as the rest of the population.

How are these people, for instance, to know that they must govern themselves in dealing with an employer in an entirely different situation if he has a strike going than they would be correspondingly required to deal with that same employer when there is no strike in evidence?

QUESTION: Well, it might be stretching it a little bit when it embraces all the policies of the Labor Board or any regulatory agency, but are they not obliged to know the law?

MR. DAVENPORT: Yes, they are. And I submit that it is their prerogative to assume that the law would be applied in the same fashion to that employer with regard to telling the truth and not telling the truth during a strike time as it would be applied to that same employer were it to be outside of that strike time. That's all we're saying.

QUESTION: But that doesn't answer the question if the law is as the Labor Board contends now.

MR. DAVENPORT: Well, it is not as they contend, Mr. Chief Justice. And I presume that if this Court had laid down such a decision that an employer had the right to give out false information in order to induce hordes of people to come to work for him as replacements, then it would be incumbent upon the parties under that posture to know what that law was, yes, sir. I would conceivably hope that in my day that never comes about.

QUESTION: So you say that even if a -- even if an illegal contract isn't enforceable by the promisee, if the other side has also committed a tort against him he can sue him for a tort, which -- this suit in here was a suit for fraud as well, wasn't it?

MR. DAVENPORT: That is correct, Justice White. This is a suit in tort, labeled and hopingly

will be proved when the day comes of fraud in the inducement and breach of contract. What the National Labor Relations Board is attempting and the employer is attempting to do is to conclude and say that tort, the determination of tort by the several states involved -- involving action during a time that a strike takes place has been preempted and taken from them for adjudication. That's what they're attempting to broaden the scope of the Act to include.

QUESTION: Would your position on that, your position as distinguished from the Board, mean that an action for tort might be maintained but an action for contract could not? Could it not be reasonable that recovery or a suit for contract alone might be preempted, but a suit for tort for fraud would not be?

MR. DAVENPORT: I think not, Mr. Chief Justice, because the position of the Board is that arguably because this arose out of a time when a labor dispute was going on, then under the concept of Garmon and under the Act and the amendments that is preempted, simply because it arose.

And may I point out where that is in error. We've relied greatly upon Linn versus United Plant Guard Workers of America, and let me quote from that, page 663 of that opinion: "Nor should the fact that defamation"

-- this was a tort; this was a defamation action between a manager of a plant on the employer after the strike was over against the union for libel and slander with regard to leaflets, et cetera, and this Court says:

"Nor should the fact that defamation arises during a labor dispute give the Board exclusive jurisdiction to remedy its consequences."

So just because -- and that's what they're really saying, that tort actions, which the states have had original jurisdiction since the inception of the Constitution, has been diminished, or jurisdiction over those torts and/or contracts, has been diminished to the extent that it has been preempted by the provisions of the Act.

And all we are saying is that this could never arguably be of any problem to the Board in extending its jurisdiction to mediate the peace of a labor industry as long as you require the employer simply to tell the truth and be honest about it. It doesn't afford any harm to the overall administration of the Act. And torts have been brought.

I think we have to, if I may, analyze the cases that have been decided by this Court previously. The principal case is that of Linn versus United Plant Guard Workers of America, and this was a case in which

the manager of the employer's plant after a strike brought suit for defamation of character, libel and slander against the union for the dissemination of leaflets and scandalous material in those leaflets concerning him during a strike.

And the Court held that that tort could be litigated by state court under two or three different theories, number one being it was such a complete concern to the respective states that it was not arguably within the purview or would not disturb the overall policy of the labor movement by allowing the states, which had a greater concern than did the labor movement with regard to that particular type of action.

Now, let's consider -- and there are only two -- there are only really four cases on which torts have been allowed. Two of those, they were allowed; two of those, they would have been allowed except the facts were not appropriate, the Linn being the principal case.

Now, let's consider what the similarities are between the Linn case and this case. There were torts committed in both cases. There was misrepresentation in both cases. The injury -- there was injury in both cases, except in our case it's a lot greater. It's 400 to one greater. There are 400 people here who were just

summarily discharged.

There were many of these workers who took, in pursuance to that advertisement, jobs at lesser pay because the current jobs they had were seasonal. There were people who left secure jobs to go because of the advantages advertised and guaranteed by that advertisement. And they have been work -- some of them have been out of work ever since.

The same -- in the Linn case and in our case, in both cases the action was -- the Defendant's action was not protected in either one of these cases by any constitutional provision, and in both of these cases the National Labor Relations Board, which so desperately wants jurisdiction of these particular items, can neither give any remedy or offer any relief to the parties that they ostensibly say they intend to protect.

Now, there were some dissimilar factors between the Linn case and our case. One, in that, in the Linn case, the NLRB does take recognition of libel and slander, at least to a limited degree, because it will consider those items in election cases and set aside elections if there has been misrepresentation with regard to libel and slander. Never has the NLRB in any case awarded any damages, awarded any form of relief in

any way, shape or form in a tort action -- never.

There is another dissimilar factor. In the Linn case the action took place between two parties to a labor dispute. There was a manager of an employer's plant suing the union. In our case it is third parties who had no part in the labor dispute whatsoever except to go to work. So that dissimilarity is much in our favor.

If I could comment about two other problems which have arisen. One, most important, there have been some remarks made both in the briefs and today concerning "permanent" being a work of art. I know of no decision and I have never seen a comment that says that "permanent" is a work of art or is any different than that which I learned in school and from Random House Dictionary of the English Language. It says "intended to exist or function for a long, indefinite period without regard to unforeseeable conditions," and gives two examples, "permanent construction" and "permanent employee."

QUESTION: Well, in this context does anyone need to have any broader definition than that these replacement people would be just as permanent as the persons they replaced?

MR. DAVENPORT: I think that is a fair

statement, yes.

QUESTION: That doesn't mean a contract for life, like life tenured judges. It just means --

MR. DAVENPORT: So long as the jobs were available and those conditions existed which were appropriate for them to be employed.

QUESTION: Well, why wouldn't you be fully protected, your clients be fully protected, if the case went to trial, and let's assume hypothetically first the court, the state court, decided that any claim under contract would be preempted, but that he went on to try the case on a fraud theory, on tort, and gave a recovery. Your clients don't really care whether they recover on contract or tort, do they?

MR. DAVENPORT: I think that's a fair statement, yes, sir.

QUESTION: But I presume they would prefer having two bases for recovery rather than just one.

MR. DAVENPORT: Absolutely. I as a practitioner would, and certainly I would advise them to.

QUESTION: Well, the fraud claim is a little harder to prove.

MR. DAVENPORT: Yes, there are five, I believe five, elements.

QUESTION: Reliance and things like that.

MR. DAVENPORT: Fraud must be made with an intent to deceive, to someone, knowing that he is going to -- or presuming that he is going to rely upon it; and that he must rely; and it must be false; and there must be detriment.

QUESTION: And in some states it requires clear and convincing evidence, as against a preponderance.

MR. DAVENPORT: That is correct.

QUESTION: Does that apply in your state?

MR. DAVENPORT: That applies in the entire State of Kentucky.

There is one other item that I would like to reply to, and that is this question about the union being the obligated representative of all of the employees. I would simply again like to refer to the contract that the union in secret, without the other employees that theoretically if that were true they would be inclined to represent, sat down with the company when the company had made a decision that it had made a bad choice and made a contract which was detrimental to the 400 that it was in a fiduciary position and obligated to represent fairly.

Now, we contend they are not, they are not the

representatives. But that is a fair statement of what position they were in if that theory would be bought. They were not the representatives. If they were the representatives, they did everything in their power to enter into a written contract which on page 10 of the brief of Belknap, Inc., says: "The company and the union further agree that, in the event it is necessary that the company terminate replacement employees in order to comply with this recall schedule, such termination shall not be subject to grievance and arbitration provisions of the contract."

So they wrote the 400 out of the contract, and that is fair representation? I would think not.

There are four cases which predominantly deal with torts that have come before this Court: Linn versus United Plant Guards, Machinists versus Gonzalez, Motor Coach Employees versus Lockridge, San Diego Building Trades Council versus Garmon, and Farmer versus United Brotherhood of Carpenters.

In the Linn case, upon which we rely, state court was allowed in that case to take jurisdiction of and adjudicate differences between a plant manager of the employer who sued for libel against the union -- a tort. In Machinists versus Gonzalez, Gonzalez sued his own union and the Court in that case said there was no

infringement of any apparent wrong or any apparent deviation of the power of the National Labor Relations Board, because the state court had only to consider the elements of the union constitution and nothing to do with the strike, and he recovered in that case.

In Motor Coach Employees versus Lockridge, a union member sued the union. Relief was denied and overturned by this Court, with fair comment that had the state court been able to consider only the constitution of the union that it would have been a matter which they had jurisdiction of; however, they had to consider a security clause of a contract and had to rely upon that for adjudication, and the Court felt that that was arguably within the purview of the NLRB. So Motor Coach Employees versus Lockridge favorably commented upon the right of Lockridge to sue, but denied his right to have it adjudicated by a state court, on the theory that in order to do so they would have to consider and comment and adjudicate a plant -- a contract security clause.

In San Diego Building Trades Council versus Garmon, the holding of that Court extensively argued the theory of state court adjudication and decided that the state court could not award damages for peaceful picketing, a matter which was arguably within the purview and preempted by the Act.

In Farmer versus United Brotherhood of Carpenters, a union officer sued in tort for damages and the Court in that case favorably commented upon his right to sue in tort, however, reviewed the proof and decided that the proof called for the state court to rely upon apparent unemployment discrimination -- I mean employment discrimination -- and therefore, while the Court sanctioned the right of the state court to adjudicate pure tort, if in doing so the state court had to pass upon an employment discrimination matter they felt that that was arguably within the jurisdiction of and preempted by the NLRB.

I'm citing these because I think that these five cases graphically set forth what the Court's progress up to this time has been, and that in two of these cases state courts were allowed to adjudicate tort; in two other of these cases the state court -- the ability of state court to do so was approved, however, the case was overturned because there was reliance on matters which was arguably under the preemption doctrine of the NLRB.

So I'm saying it is our position that tort has been allowed before, tort has been allowed under, for a better expression, thinner cases and circumstances than this; and that our only position is one which could

probably be summed up by arguments that have been made by questions from this Court far better than I would ever have the ability to do so.

But essentially we must, I feel, give some attention to simple propositions of law which I learned in law school, and that is, for every wrong there must be found a remedy. State courts have never been preempted from adjudicating tort. That is matters which were reserved to the state court by the Tenth Amendment. Now, to the extent that the National Labor Relations Act may have carved out areas of that --

QUESTION: You don't really mean all that, do you?

MR. DAVENPORT: Sir?

QUESTION: You don't really mean that the state courts have been -- can adjudicate any kind of a tort without preemption?

MR. DAVENPORT: Oh, no, no.

QUESTION: Well, that's just what you said.

MR. DAVENPORT: I beg your pardon. I didn't mean to, sir. I meant that tort in general had not been preempted, that certain areas of tort adjudication have been preempted by the NLRB.

And essentially all of the relief which these people are asking is, as simply put forth by the

questions, it's no imposition upon a employer to go out and hire employees and tell them the reasonable, the satisfactory circumstances under which they will be employed, and that they may have to be terminated at such a time in the future, or to say nothing, for that matter; but not to overtly advertise something that it knows full well it cannot fulfil.

The depositions in the record in this case show that on February the 1st, at the time the strike began, and prior to that time there had been meetings with their attorneys and the plan to hire replacement employees had already been put into effect. The employer was present and in meeting with their attorneys when the language of the advertisement was put into effect.

So it cannot be said that the employer was saying something he didn't know the consequences of. The employer was well represented at that time, by one of the most prestigious law firms in the State of Kentucky. And that therefore, when you overtly go out of your way, when you also are planning to give a raise, when you most assuredly must have been advised that to do so is to create an unfair labor practice, and then to hire a complete set of employees knowing that you may not be able to fulfil those obligations, we submit is a

matter which is not even arguably within the preemption area carved out by Congress.

Thank you.

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

(Whereupon, at 2:12 p.m., the case in the above-entitled matter was submitted.)

* * *

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

Belknap, Inc., Petitioner v.

Duwaine E. Hale, et al., # 81-1966

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BY Pierce Hammond

(REPORTER)