

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-117

TITLE A. G. BAKER, JR., ET AL., Appellants V. GENERAL MOTORS
CORPORATION AND MICHIGAN EMPLOYMENT SECURITY COMMISSION

PLACE Washington, D. C.

DATE April 2, 1986

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IN THE SUPREME COURT OF THE UNITED STATES

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A. B. BAKER, JR., ET AL., :
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Appellants :
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v. : No. 85-117
:
GENERAL MOTORS CORPORATION :
AND MICHIGAN EMPLOYMENT :
SECURITY COMMISSION :
:
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Washington, D.C.
Wednesday, April 2, 1986

The above-entitled matter came on for oral argument
before the Supreme Court of the United States at
11:31 a.m.

APPEARANCES:

JORDAN ROSSEN, ESQ., Detroit, Michigan; on behalf
of the Appellants

PETER G. NASH, ESQ., Washington, D.C.; on behalf
of the Appellees

LOUIS R. COHEN, ESQ., Deputy Solicitor General,
Department of Justice, Washington, D.C.; as
amicus curiae in support of Appellees

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1 P R O C E E D I N G S

2 CHIEF JUSTICE BURGER: Mr. Rossen, I think you
3 may proceed whenever you are ready.

4 ORAL ARGUMENT OF JORDAN ROSSEN, ESQ.

5 ON BEHALF OF THE APPELLANTS

6 MR. ROSSEN: Thank you, Mr. Chief, Justice,
7 and may it please the Court:

8 Appellants are non-striking General Motors employees
9 who were laid off due to strikes elsewhere. It is agreed
10 that the only basis for the labor dispute disqualification
11 in this case was because they pay emergency dues.

12 The issue is may a state deny unemployment com-
13 pensation to these Appellants solely because they paid
14 emergency or increased dues lawfully required as a condition
15 of remaining union members where the dues were for the
16 union strike fund from which strikers later receive strike
17 benefits.

18 Appellant's union had a convention in October
19 and voted to require as a condition of membership emergency
20 dues of all UAW members in the United States and Canada.
21 And, it is agreed and stipulated that these Appellants
22 paid \$20 to \$40 each for the months of October and November,
23 1967 to their own local unions which then sent the increase
24 or emergency dues to the international union's strike
25 fund.

1 Appellants continued working at their own plants.
2 Their local union settled their contract which Appellants
3 ratified.

4 That year there was no national strike at General
5 Motors Corporation. Instead, the General Motors agreement
6 was settled in December and ratified by the union members.

7 In late January, three General Motors foundry
8 locals went on strike over local issues and after those
9 11 to 12-day strikes ended, they received no more than
10 \$18 from the international union's strike fund.

11 Those foundry strikes caused part shortages
12 and resulted in layoffs at Appellant's plant. Appellants
13 were comparatively few members at each plant who were
14 selected because they had low seniority and they were
15 laid off from those plants by General Motors and they
16 applied for unemployment compensation for that February,
17 three months after they paid those dues. They were found
18 eligible under state law in the sense that they had worked
19 long enough to earn their compensation, they had enough
20 credit weeks, they were available for work, they were
21 seeking work, they wanted to continue working, and they
22 were involuntarily unemployed.

23 The labor dispute disqualification was asserted
24 as a reason for denying them compensation and under all
25 aspects or all parts of the Michigan Labor Dispute statute,

1 they were not disqualified except one. What we mean by
2 that is they were held by all agencies and courts to not
3 be in the same locations as the strikers, they were not
4 participating in any foundry strikes, they were not
5 interested in them in the sense that they could not benefit
6 from them nor could they influence those negotiations
7 or strikes.

8 They were disqualified because they had financed
9 the labor dispute as held by the Michigan court because
10 they had paid those increased or emergency dues the previous
11 October.

12 If possible, we would like to get into our argument
13 a little bit and then try to respond to some of the points
14 made by General Motors.

15 It is pretty well agreed that Appellants would
16 not have been disqualified from their unemployment compensa-
17 tion but for the facts that they chose to remain union
18 members and paid these increased or emergency dues.

19 The Michigan Supreme Court correctly held that
20 this conflicts with their Section 7 right to assist their
21 union and it also conflicts with their right to join and
22 remain union members if they choose to do so.

23 Under this Court's ordinary preemption rules,
24 state action which conflicts with such Section 7 rights
25 would be preempted, wouldn't stand, unless Congress affirma-

1 tively intended to allow such a conflict.

2 QUESTION: Mr. Rossen, did any workers refuse
3 to pay the increased dues?

4 MR. ROSSEN: It is stipulated, Justice O'Connor,
5 at page 173 of the record that all claimants paid these
6 dues, these emergency dues in accordance with the UAW
7 Constitution. Thus, there is no evidence that anyone
8 refused to pay the dues.

9 QUESTION: What would the union do with a member
10 who refused to pay the increased dues for the purposes
11 of financing the strike?

12 MR. ROSSEN: There is no evidence that the union
13 took any action against any of the members in terms of
14 trying to get someone's job or anything else under Section
15 8(a)(3). It is our position that the dues were lawfully
16 required dues under the union constitution and, in fact,
17 it is stipulated and found that they were paid under the
18 union constitution and, thus, they were required to be
19 union members.

20 So, failure to pay those dues based on those
21 stipulations would jeopardize a person's union membership
22 if he refused or she refused to pay those dues.

23 QUESTION: Do you concede that the state can
24 disqualify non-strikers who finance a strike by means
25 of payments other than in the form of union dues?

1 MR. ROSSEN: Below and in this Court we have
2 not ask that the Michigan financing disqualificational
3 provision be stricken.

4 QUESTION: On its face.

5 MR. ROSSEN: Pardon?

6 QUESTION: On its face you mean.

7 MR. ROSSEN: On its face, that is right.

8 QUESTION: So you concede then that it can apply
9 if it is payment other than union dues?

10 MR. ROSSEN: We concede that it can apply and
11 be used as a disqualification when it is not based on
12 the exercise of someone's Section 7 rights.

13 QUESTION: I don't think that answers the question.
14 That really doesn't answer the question, because, in effect,
15 it would be an exercise of a Section 7 right to finance
16 a strike, wouldn't it?

17 MR. ROSSEN: Well, it may or may not, Justice
18 Stevens. For example, there are situations where an individual
19 might send money if there is an existing strike and that
20 individual could do it alone, that individual may or may
21 not be a union member, and that might be used as a basis
22 for disqualifying someone from financing and it would
23 not involve the exercise of Section 7 rights.

24 QUESTION: What if you did not -- I am still
25 not sure of your answer to Justice O'Connor's question

1 is why I am following up.

2 What if they had just sent out a special assessment
3 for the purpose of financing the strike and then as a
4 byproduct of that strike these people were laid off
5 temporarily. What your position be?

6 MR. ROSSEN: Well, our position first of all
7 is that is not what happened here.

8 QUESTION: It is a different case, I understand.

9 MR. ROSSEN: But, I didn't want to leave any
10 misunderstanding on that score. But, if the union did
11 that and all the money was going to the strikers --

12 QUESTION: Well, it goes into a large fund and
13 the fund in turn is used to support the --

14 MR. ROSSEN: I was going to say if the money
15 was going to the strikers and the union is a mere collection
16 agent, I am not sure if it makes a difference if it is
17 labelled dues or not and I am not sure that would really
18 involve assisting the union, even though the union is
19 a collection agent, any more than if the union collects
20 money for the United Fund and sends it to someone.

21 But, if the money goes into a large pot, then
22 I think -- into the union's strike fund, even though unlike
23 this case there is an existing strike at the time, then
24 I think the case would be very much like General Motors
25 versus Bowling which was decided by the Illinois Supreme

1 Court and the Illinois Supreme Court there said that because
2 the union was really deciding how this money was going
3 to be paid, the union would decide when to pay it and
4 how much and to whom, and it was not these dues -- and
5 there they were people in the same plant paying dues,
6 increased dues, double dues, the Illinois Supreme Court
7 said it would not interpret financing under its statute
8 to apply to those payments because they were dues and
9 the union really was deciding how it ought to pay them.

10 Now, that is different from a situation where
11 the payer knows that 100 percent of the money paid is
12 going to -- even if it goes into a pot -- is going to
13 be sent to people on the existing strike.

14 But, we think the Bowling situation, the example
15 that I gave there, it is our position that that would
16 be preempted even though it would leave our case as a
17 much stronger case for preemption, we believe that there
18 also would be preemption in that case and that Congress
19 did not intend in the National Labor Relations Act or
20 the Social Security Act to disqualify anyone for financing,
21 let alone for paying dues.

22 Did that get closer?

23 QUESTION: Close.

24 MR. ROSSEN: In terms of the legislative history,
25 the National Labor Relations Act does not provide any

1 guidance as to congressional intent in this case. And,
2 in 1935 when the Social Security Act was passed, there
3 was no financing provision in any state labor dispute
4 statute.

5 So, for that reason you cannot say, unlike in
6 New York Telephone, for example, where there was an existing
7 statute that Congress perhaps was aware of, you cannot
8 say that Congress was aware of any financing provision
9 in 1935.

10 Now, the State of Michigan relies on 1936 action
11 by the Social Security Board. After the Social Security
12 Act was passed where the Social Security Board recommended
13 changing the disqualification of everyone in a struck
14 establishment to only apply to situations where people
15 participate, finance, or are directly interested in those
16 excused within that establishment.

17 But, in 1940, the Social Security Board, aware
18 of a few applications by state agencies, not courts,
19 recommended eliminating any financing provisions in these
20 statutes because, as the Social Security Board said, it
21 might be used to disqualify people for solely for payment
22 of dues.

23 Now, in 1943, Congress indicated its awareness
24 of this Social Security Board action because it changed
25 a District of Columbia statute to do as suggested in 1936

1 by adding participating and directly interest, but it
2 specifically omitted the financing provision.

3 And, since 1935, no state court until this Michigan
4 court has ever disqualified anyone under a financing pro-
5 vision for solely paying union dues.

6 Now, what we mean by that when we saying "for
7 solely paying union dues," we mean in other cases where
8 dues may have been involved, the people were also in the
9 same establishment as the strikers, they were also held
10 to be interested in the strike financially, and they were
11 also held to be participating, so there is no pure dues
12 holding in unemployment insurance history in the United States
13 by a court until this one, and there --

14 This gets to be a little bit back to Justice
15 Stevens' question. There is something else that is also
16 flukey about this Michigan decision. The financing provisions
17 came out of English law and they were aimed at situations
18 where people in a factory were striking and other people,
19 knowing of those strikes, sent money to those strikers
20 when then caused their own layoffs.

21 In every other financing decision in the United
22 States, including agencies, whether or not they involve
23 dues, they all involve the same situation of an existing
24 strike that people were sending money to.

25 We mention this because it emphasizes the unusual

1 quality and nature of the Michigan decision which makes
2 it, in our opinion, just as unusual as what Florida did
3 in Nash where Florida was the only state to interpret
4 its labor dispute disqualification in a bizarre way and
5 yet this Court, despite the fact that that was unusual,
6 did not allow Florida to punish that worker because she
7 exercised statutory rights.

8 General Motors relies on this Court's decision
9 in New York Telephone and says that because Congress,
10 as indicated in New York Telephone, was apparently aware
11 of a state statute which paid benefits to strikers after
12 disqualification and also disqualified strikers.

13 Therefore, it should be assumed that Congress
14 also intended to permit disqualifying anyone else who
15 exercises other Section 7 rights wherever there is a strike.

16 But, as Your Honors know, New York Telephone
17 rested on awareness by Congress of a specific statute
18 which did that, and as we have shown, there was no statute
19 in existence in 1935 that did what happened to these people.

20 And, the fact that Congress was aware that a
21 state may impede the right to strike does not mean that
22 Congress intended or should be implied to permit a state
23 to impede all other Section 7 rights or rather all other
24 NLRA rights, and certainly Nash is an example of that
25 holding.

1 And, General Motors concedes in its brief that
2 the state could not disqualify persons because they are
3 union members.

4 So, there are situations where a state's labor
5 dispute disqualification has been limited.

6 And, striking for NLRA purposes and for unemploy-
7 ment insurance purposes is different than other Section
8 7 rights, particularly the rights of free association.

9 Strikers leave work and things can happen to
10 them under the NLRA that economically disadvantage them.
11 General Motors could have replaced the foundry strikers
12 if it had wished, permanent replace them, but General
13 Motors could not have punished these Appellants because
14 they chose to pay these dues even if there was a foundry
15 strike in existence at the time and even if some of those
16 dues reached those foundry strikers. General Motors could
17 not have laid them off because they paid these dues, and
18 yet General Motors is asking this Court, as it did in
19 Michigan, to punish these claimants because they paid
20 these dues.

21 QUESTION: They are withholding some state benefits,
22 I suppose, that they would otherwise have been qualified
23 for.

24 MR. ROSSEN: Yes. They were eligible in every
25 other respect but for the fact that they were held disqualified.

1 for paying these emergency dues, so they had met all the
2 other eligibility requirements.

3 QUESTION: And you say that burdens their Section
4 7 rights?

5 MR. ROSSEN: We do and Michigan did too. The
6 Michigan Supreme Court agreed with that much and held
7 that there was a conflict.

8 And, this gets us close, I think, to what this
9 Court did yesterday in Golden State. We are not asking
10 Michigan to pay benefits to these Appellants because they
11 paid their union dues. We are asking Michigan to pay
12 benefits to these Appellants because they were laid off
13 and forced out of work.

14 And, yet, General Motors is asking Michigan
15 to deny benefits to these Appellants because they paid
16 those dues. General Motors is conditioning -- asking
17 the state to condition denial just on their paying dues
18 which they were required to pay to remain members.

19 And, this Court, every Justice of this Court
20 in recent cases, have expressed concerned for protection
21 Section 7 rights, particularly rights of employee self-
22 organization which we believe would include the right
23 to remain union members and to pay these dues.

24 Certainly if you leave the right to resign
25 unfettered, it seems to me that you should leave the right

1 to remain unfettered also if people choose to remain union
2 members and pay these dues. We do think it burdens those
3 rights.

4 QUESTION: Well, employers can walk strikers
5 out to. That burdens their right to strike pretty much.

6 MR. ROSSEN: Yes. Employers are allowed to
7 take action against strikers --

8 QUESTION: Without committing an unfair labor
9 practice too.

10 MR. ROSSEN: That is right. And, they can replace
11 strikers, as I indicated earlier, and state statutes allow --
12 State statutes regularly disqualify strikers from unemploy-
13 ment compensation and they would have done that --

14 QUESTION: So, you wouldn't think the strikers --
15 That the state must pay unemployment benefits to strikers.

16 MR. ROSSEN: No, no. We --

17 QUESTION: Isn't that burdening Section 7 rights?

18 MR. ROSSEN: Yes, it does burden Section 7 rights
19 to deny benefits to strikers.

20 QUESTION: Well, why may the state do it?

21 MR. ROSSEN: The state may do it because as
22 Your Honor said in New York Telephone Congress intended
23 to permit them to do it.

24 QUESTION: To either grant or deny them.

25 MR. ROSSEN: Exactly, to strikers.

1 -QUESTION: Yes.

2 MR. ROSSEN: And, strikers have not been treated
3 the same or synonymously with dues payers --

4 QUESTION: But, the strikers' claims when they
5 are strikers -- the claim still is that their Section
6 7 rights are being burdened by a refusal to pay unemployment
7 benefits, just like the claim is here that these people
8 who finance strikes are exercising their Section 7 rights.

9 MR. ROSSEN: And but for Congress' awareness,
10 as indicated in New York Telephone, that might be considered
11 improper too.

12 But, strikers, even if there were no labor dispute
13 disqualification, Justice White, strikers are different
14 because they voluntarily leave their jobs and Congress
15 was probably aware that -- in 1935 -- people who leave
16 their jobs voluntarily generally don't get unemployment
17 compensation.

18 Even if you had no labor dispute statute --
19 I mean it is the traditional unemployment insurance concept,
20 as old as any unemployment insurance statute in history
21 that people who leave work are disqualified from unemployment
22 compensation.

23 QUESTION: How did these people lose their jobs?

24 MR. ROSSEN: They were the low seniority people
25 at their plants who were laid off by General Motors when

1 'they wanted to continue working because there was a shortage
2 of materials.

3 QUESTION: They weren't out of their jobs because
4 they were on strike. They were out of their jobs for
5 another reason.

6 MR. ROSSEN: Yes, that is right. They were
7 out of their jobs -- They were involuntarily out of work,
8 laid off by General Motors because General Motors didn't
9 have enough parts because of those foundry strikes and
10 General Motors chose to lay off these Appellants, com-
11 paratively few Appellants at each plant which was a humane
12 reaction in a way, they didn't lay off everyone.

13 If possible we would like to reserve any further
14 time for rebuttal.

15 Thank you.

16 CHIEF JUSTICE BURGER: We will resume at 1:00,
17 counsel.

18 (Whereupon, at 11:54 a.m., the case in the
19 above-entitled matter was recessed, to reconvene at 1:00
20 p.m., this same day.)
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1 compensation benefits from the states in which they were
2 laid off.

3 The benefits in this fund are paid not only
4 to strikers but also to those who are laid off as a result
5 if they don't get unemployment compensation benefits.

6 In January and February of 1968, what was
7 anticipated, indeed, came to pass. Three General Motors
8 foundries went out on strike and as a result of a lack
9 of products, parts, being made by those foundries a number
10 of employees, including all the Plaintiffs in this case,
11 were laid off at other GM plants because of the strike
12 of their GM brethern in those three foundries.

13 They were denied -- In this case, the Plaintiffs
14 were denied unemployment compensation benefits in the
15 State of Michigan because they had financed a strike which
16 had resulted in their unemployment. The financing arrange-
17 ment those these special dues payments were, as found
18 by the Michigan Supreme Court, or did, as found by the
19 Michigan Supreme Court, have a meaningful connection with
20 the unemployment which resulted from the strike and as
21 a consequence they were denied unemployment compensation.

22 One further fact --

23 QUESTION: Mr. Nash, could the state treat the
24 payment of regular union dues as financing the strike?

25 MR. NASH: That is not the case we have here.

1 QUESTION: I know that.

2 MR. NASH: That is a tougher case, but I think
3 analytically and at least arguably, yes, they could.
4 And, indeed, I think there are 37 states whose statutes
5 do, in fact, treat the payment of regular union dues as
6 a disqualification for unemployment compensation benefits.

7 There are a number of reasons for that, I think,
8 and the reasons for that primarily, however, I believe,
9 come from this Court's analysis of the unemployment compen-
10 sation system and the National Labor Relations Act and
11 New York Telephone.

12 This Court, at least as I read the decision
13 of all of the Justices in New York Telephone, determined
14 that Congress, when it enacted the National Labor Relations
15 Act, intended to leave the parties in a neutral position,
16 management and labor, each to bear the full economic
17 consequences of a strike. Employees wouldn't be paid
18 wages and the employer wouldn't be able to run his business
19 and would lose money. Each side would bear the full
20 economic consequences.

21 QUESTION: Well, in your view, I take it any
22 local strike supported by a national union strike fund
23 that leads to some lay offs of non-strikers will justify
24 denying the benefits to the non-strikers.

25 MR. NASH: Whether it justifies it or not, in

1 terms of how the state interprets its unemployment compen-
2 sation statute is one matter. The question before this
3 Court is does the Constitution, does the National Labor
4 Relations Act and the Social Security Act allow the states
5 to so act.

6 QUESTION: Well, maybe the question is whether
7 Congress authorized that result.

8 MR. NASH: Yes. I believe the answer to that
9 question is yes, that Congress authorized that, not only
10 in terms of the National Labor Relations Act and the balance
11 of power struck, but more particularly --

12 QUESTION: What is the evidence that leads you
13 to think that Congress intended to go so far as the
14 circumstances I have described with regular dues?

15 MR. NASH: As I say, that is a tougher case
16 than ours. But, as I see it, what Congress intended and
17 what this Court found that Congress intended when it passed
18 the National Labor Relations Act was that each party bore
19 the economic consequences of that and that a state interferes
20 with and is preempted in its actions by the National Labor
21 Relations Act if it, in fact, shifts that economic burden
22 or changes that economic burden in either one of two ways.
23 Either it requires the employer to pay more, it costs
24 the employer more to take a strike, or if what the state
25 is doing cushions the impact of that strike upon employees.

1 In New York Telephone, this Court, as I read
2 the decisions, said that absent the Social Security Act,
3 payment of benefits to strikers, unemployment benefits,
4 would be preempted by the National Labor Relations Act
5 because it does both those things.

6 Employers contribute to an unemployment compensa-
7 tion fund. If that money is paid to the strikers, it
8 not only cushions the impact of that strike on those strikers,
9 but also costs the employer an awful lot more to take
10 that strike.

11 The same is true in this particular case. If
12 an employer is required to pay benefits -- employer to
13 the state unemployment compensation fund -- is required
14 to pay benefits to those laid off as a natural consequence
15 of a strike, laid off in another plant, it costs the employer
16 more to take that strike because it has to pay benefits
17 to everybody that is laid off as a result of that strike.

18 And, particularly in this case, where the strike
19 fund pays benefits not only to strikers, but also to those
20 laid off as the result of a strike, unless those latter
21 people receive unemployment compensation benefits -- If
22 the State of Michigan paid unemployment compensation benefits
23 to employees in this case who financed the strike, the
24 employer would have to pay for all of that.

25 And, in addition, the strike fund would not

1 diluted by that, thus giving additional economic power
2 to all the people on strike because their strike is going
3 to be bigger, bigger benefits could be paid over a longer
4 period of time.

5 So that the payment of benefits in this case
6 has the same effect of conflicting with policies of the
7 National Labor Relations Act as did the payment of strike
8 benefits or benefits to strikers in the New York Telephone
9 case.

10 The Court held in this case, however, that that
11 conflict with the National Labor Relations Act is allowed
12 and was intended to be allowed by Congress because Congress
13 passed the Social Security Act which granted to the states
14 broad powers to structure their social security systems
15 the way they wanted to structure them.

16 QUESTION: Were the strikes here at the foundry
17 plants over purely local issues?

18 MR. NASH: I don't know that, but I am assuming
19 that they were, yes.

20 QUESTION: Because the national issue had already
21 been resolved.

22 MR. NASH: That is correct, although that is
23 not necessarily true in local strikes and it was not true
24 in later -- Or at least from GM's perspective it was not
25 true in later strikes at local plants.

1 QUESTION: So, the non-striking workers we are
2 concerned about really didn't have any interest in those
3 local issues, I take it.

4 MR. NASH: That is correct in this sense. Well,
5 they had an interest in the strike to the extent that
6 any time their brethern are able to mount a strike they
7 have more solidarity and they are able to improve benefits
8 for them.

9 They did not have a direct interest in the strike.
10 Indeed, had they had a direct interest, we wouldn't be
11 here on this issue today because the Michigan statute
12 says that employees are disqualified from unemployment
13 compensation benefits if they are laid off as a result
14 of a strike in which they have a direct interest. So,
15 presumably they would have been denied benefits on that
16 basis rather than on the basis of having financed the
17 strike.

18 But, the impact on the economic -- The economic
19 impact is the same. The balance in this case is tipped
20 against the employer and in favor of the employees exactly
21 the same as it was in New York Telephone.

22 To reiterate, this Court, however, found that
23 even though that conflicted in New York Telephone with
24 the National Labor Relations Act the state was allowed
25 to engage in that kind of conflict because Congress had

1 passed the Social Security Act giving the states broad
2 power to structure their own unemployment compensation
3 system the way they wanted to.

4 And, as a consequence of that, even though those
5 payments in that case interfered with the strong policy
6 of the National Labor Relations Act for a state to remain
7 neutral, it was okay for the states to do it because Congress
8 had given the states the right to make those calls and
9 structure their own system.

10 That is the way we come at this case looking
11 at New York Telephone. The Plaintiffs in this case come
12 at it differently. They say that here the employer has
13 interfered with a Section 7 right of employees to finance
14 a strike, that is a Section 7 right, and as a consequence
15 you have got basically a Garmon preemption case that a
16 state can't act in such a way as to interfere with a Section
17 7 right.

18 First of all, we don't see that the interference
19 with a Section 7 right is equivocal at all. Indeed, in
20 New York Telephone, as Mr. Justice White pointed out before
21 the break, in New York Telephone the state had it denied
22 unemployment compensation benefits, as every member of
23 this Court said they could have, would have interfered
24 with the Section 7 right to strike. Indeed, that right
25 is so important that Congress went to all the trouble

1 to pass Section 13 of the National Labor Relations Act
2 to restate once again that that was a protected right,
3 something it has not done with the financing of a strike.

4 So, the fact that it interferes with a Section
5 7 right should not make a difference.

6 And, in this particular case, the Section 7
7 allegedly interfered with the right to finance a strike
8 or finance a union -- paying unemployment benefits to
9 those people has the same economic impact, i.e., the shifting
10 of the balance under the National Labor Relations Act
11 and the state ought to be able to do it.

12 QUESTION: When members strike and a state denies
13 unemployment compensation, there is the same burden, I
14 suppose, on Section 7 rights.

15 MR. NASH: That is correct.

16 QUESTION: But, the reason it isn't an unfair
17 labor practice or the reason it isn't preempted is because
18 of the neutrality argument, I suppose.

19 MR. NASH: Correct. I don't know that you can
20 really call it so much an interference with a Section
21 7 right, I prefer to look at it that if there is a strike --

22 QUESTION: What do you call it in this case?
23 Whatever it is it is the same --

24 MR. NASH: You bear the economic consequences
25 of your actions. When you strike and go out, yes, I guess

1 one might say and probably you would say by not paying
2 them unemployment compensation benefits, you have interfered
3 with their right to strike, but you really haven't. What
4 you have really done --

5 QUESTION: Well, you are interfering here at
6 least with your right to contribute to the support of
7 a union.

8 MR. NASH: That is correct, but that is all
9 part and parcel of the union bearing the natural economic
10 consequences of the strike.

11 In fact, when the employees go out on strike,
12 and in this case it is a very carefully drawn issue, here
13 employees of General Motors went out on strike and the
14 State Supreme Court found that, in fact, the employees
15 who were laid off and denied benefits here significantly
16 contributed to their unemployment because they contributed
17 to a strike fund which supported those people who went
18 out on strike.

19 That also comes close to what -- or is consistent
20 with what the Social Security Act intended when it said
21 to the states, pass your own unemployment compensation
22 systems.

23 QUESTION: Did these people lose their jobs
24 on account of the strike?

25 MR. NASH: Yes.

1 QUESTION: There is no question about that?

2 MR. NASH: No question. They were laid off
3 because the foundries were struck by their fellow UAW
4 members in a strike which they helped to finance by paying
5 these special dues to a strike fund and they were laid
6 off because the parts coming out of the foundries weren't
7 coming any more because of the strike and there wasn't
8 enough work for them in their plants.

9 QUESTION: Well, I suppose if the foundry workers
10 had struck and then the employer locked everybody out,
11 what about the people who didn't strike but who were locked
12 out, but who had been contributing to the union?

13 MR. NASH: The State of Michigan, under its
14 unemployment compensation statute, says that if an employer
15 locks out employees that does not disqualify them from
16 unemployment comp.

17 So, in this case, they would have been paid
18 their unemployment compensation had the employer locked
19 them out, even though that interferes with the employer's
20 ability to lock out.

21 QUESTION: But, all they did though, instead
22 of locking out, they laid them off.

23 MR. NASH: They laid them off as a result of
24 no work.

25 QUESTION: Of the strike. Well, because there

1 was a strike.

2 MR. NASH: That is correct. But, a lock-out,
3 I think, really is normally defined by courts, labor board,
4 and arbitrators as an act by an employer seeking to put
5 pressure on a union to get the union to concede to the
6 employer's position. Here, the employer wasn't putting
7 any pressure on anybody. He just didn't have work and
8 laid these people off and whether the union in that plant
9 ever conceded to his position on anything was irrelevant.
10 The people would come back to work as soon as there was
11 work for them. It really is not in the context of a lock-
12 out as this Court looked at in American Ship and Brown.

13 QUESTION: Counsel, I assume that you join those
14 who say these are voluntary contributions that the union
15 members made. Voluntary. If they didn't make it they
16 lost their union membership and their job, but that is
17 voluntary.

18 MR. NASH: Well, in this particular case they
19 would not have lost their job. There was no --

20 QUESTION: Would they have lost their union
21 membership?

22 MR. NASH: They might have lost their union
23 membership.

24 QUESTION: Well, didn't the constitution say
25 so?

1 MR. NASH. The UAW's constitution?

2 QUESTION: Yes.

3 MR. NASH: I am not an expert on the UAW's
4 constitution, but I would assume, yes, they could have
5 lost their membership.

6 QUESTION: So, you consider that voluntary?

7 MR. NASH: No. I don't know whether it is
8 voluntary or not, but I don't know that that is relevant.

9 QUESTION: You just said a little while ago.
10 I just wanted to know, did you need that for your argument?

11 MR. NASH: No, I don't need it to be voluntary
12 and if I said that I spoke too fast. No, it doesn't have
13 to be voluntary, the payment of these special dues.

14 In fact, they aren't being denied unemployment
15 compensation benefits in this case because they paid emergency
16 dues, because they exercised a Section 7 right. What
17 the State of Michigan held was they are being denied
18 unemployment compensation benefits because they contributed
19 to their own unemployment.

20 QUESTION: And, the difference is?

21 MR. NASH: They contributed to their own unemploy-
22 ment. That is the key to the State of Michigan. Whether
23 that is a Section 7 right or not is really irrelevant.
24 And that really is the key --

25 QUESTION: What is that other than semantics?

1 MR. NASH: Well, it may be semantics in this
2 Court. It was not semantics in the State of Michigan.
3 The State of Michigan determined that employees shall,
4 in fact, be paid unemployment compensation benefits unless
5 they contribute in some way to their own unemployment.
6 If they quit, they are fired for cause, a whole bunch
7 of ways in which a person contributes to his or her own
8 unemployment and, thus, is denied benefits. Had they gone
9 out on strike, they would have contributed obviously to
10 their own unemployment.

11 Financing a strike which resulted in their lay
12 off in view of the State of Michigan, and I think correctly
13 so in the interpretation of its statute, constitutes a
14 contribution by the employee to his own unemployment and
15 results in a denial of unemployment benefits.

16 These people then are eligible to receive benefits
17 under the UAW strike fund and really what we are talking
18 about here is shifting the funding of the UAW strike fund
19 at least indirectly from the UAW and its members to the
20 employer, General Motors in this case.

21 QUESTION: Would it have been an unfair labor
22 practice for the employer to fire these people for having
23 paid the special dues?

24 MR. NASH: Yes, I think so. That is a Section
25 7 to pay those dues and the employer could not fire them.

1 QUESTION: Yes.

2 MR. NASH: Correct. But, it seems to me that
3 that doesn't get us very far in determining whether or
4 not a state program which is intended to provide benefits
5 to people who don't contribute to their own unemployment
6 has to provide benefits to people who, in fact, contribute.

7 QUESTION: And, I suppose if he had fired them
8 for paying the dues while the unfair labor practice pro-
9 ceeding was going on, these people wanted unemployment
10 benefits, they would have got them.

11 MR. NASH: I don't know what the answer to that
12 case is. They probably would have because there they
13 would have been unemployed as a result of being fired
14 rather than as a result of a strike, so I guess --

15 QUESTION: On the other hand, they were contributing
16 to the strike fund and you can't say that they didn't
17 contribute to their own unemployment.

18 MR. NASH: Well, except that if you say the
19 reason they are now unemployed is because they were fired
20 rather than because --

21 QUESTION: They were fired because they con-
22 tributed.

23 MR. NASH: I --

24 QUESTION: Well, anyway, it is a tough case.

25 MR. NASH: That is a tough case and this is

1 not our case, yes, Your Honor.

2 I think in that circumstance they were fired
3 illegally and, therefore, they probably would get the
4 unemployment benefits and they certainly would be eligible
5 for back pay in a National Labor Relations Board proceeding
6 if they then made an offer to return to work.

7 This case, however, is -- and I would like to
8 stress at this point -- not a question -- doesn't present
9 the question which I think Jordan was really talking about
10 earlier of whether the State of Michigan correctly inter-
11 preted its statute, whether it went off on some whimsy,
12 whether or not the way the State of Michigan interpreted
13 its statute is inconsistent with the way the State of
14 Illinois interpreted its statute. The whole question
15 in this case is is the State of Michigan free under the
16 Constitution of the United States to make the interpretation
17 it made? Does that conflict with an act of Congress and
18 we submit it does not conflict, indeed, it is consistent
19 with the National Labor Relations Act. It certainly is
20 consistent with what the Social Security Act, in fact,
21 allows the states to do and under those circumstances
22 there is no basis for saying that this act is preempted
23 by the National Labor Relations Act.

24 Congress has told the states you can do this
25 kind of thing in structuring your own unemployment

1 compensation system. This Court has found that in the
2 New York Telephone case, and, as a consequence, whether
3 Michigan was right or wrong in the way they interpreted
4 its statute, it has the constitutional right to be either
5 right or wrong, and that is not the issue.

6 The issue is that the National Labor Relations
7 Act and the Social Security Act allow the State of Michigan
8 to do what they did and the answer to that we submit is
9 clearly yes.

10 CHIEF JUSTICE BURGER: Mr. Cohen?

11 ORAL ARGUMENT OF LOUIS R. COHEN, ESQ.

12 AS AMICUS CURIAE IN SUPPORT OF APPELLEES

13 MR. COHEN: Mr. Chief Justice, and may it please
14 the Court:

15 There is a strong national labor policy reiterated
16 by this Court only yesterday against state interference
17 with the collective bargaining process in a way that alters
18 the economic balance between labor and management.

19 One way to view this case is that it presents
20 the question whether a state is permitted to honor that
21 federal policy and deny unemployment compensation to employees
22 who the state found had paid extraordinary emergency dues
23 that foreseeably went to support a strike that foreseeably
24 caused their own unemployment or whether, as Appellant
25 suggests, the state is required to pay benefits because

1 the financing activities are protected by Section 7 because
2 they are labelled dues.

3 The government, including the National Labor
4 Relations Board, believes that Congress meant to leave
5 the states free to deny benefits in this situation.

6 We think New York Telephone clearly suggests
7 that answer. There, after considering the legislative
8 history, the Court ruled that states were free to deny
9 benefits to persons engaged in the quintessential Section
10 7 activity, striking.

11 There are, I think, only two distinctions between
12 New York Telephone and this case. First, New York Telephone
13 involved the question whether the state could pay benefits.
14 This case involves what I think every member of the New
15 York Telephone court would have thought was the easier
16 question, whether the state can deny benefits.

17 QUESTION: Well, the payment of benefits didn't
18 involve the interference with any protected rights I gather.

19 MR. COHEN: The payment did not. The denial
20 of benefits, Justice White, would have burdened the exercise
21 of a Section 7 right to strike and yet I think it was
22 an assumption and Appellants have conceded here today
23 that the state was at least at liberty to deny benefits
24 in that situation.

25 QUESTION: Yes, yes. But, nevertheless, the

1 argument against paying them was that the state shouldn't
2 upset this balance. That is the argument.

3 MR. COHEN: Yes. We think that the same argument
4 is applicable here to the payment of benefits to people
5 who were found by the state to have been as closely allied
6 to the actual strikers as these Appellants were.

7 We think, indeed, that either the legislative
8 history nor the logic of New York Telephone suggests any
9 distinction.

10 I want, first of all, to stress that Appellants
11 are just wrong when they imply that the legislative history
12 of the Wagner Act and the Social Security Act in 1935
13 distinguishes in some way between actual strikers and
14 people who finance a strike that leads to their own
15 unemployment. There is no such distinction.

16 There were, as the Court noted in New York Telephone,
17 five state unemployment compensation statutes that predated
18 the Wagner Act. None of those statutes had a special
19 category for actual strikers. All of those statutes dis-
20 qualified, or in the case of New York, delayed payments
21 to a class of people consisting of everyone who was put
22 out of work because of a strike, strikers, financiers,
23 and innocent bystanders.

24 The draft statutes that were submitted to Congress
25 while it was considering the Social Security Act contained

1 a similarly broad disqualification and when Congress acting
2 as the District of Columbia legislature adopted an unemploy-
3 ment compensation statute for the District of Columbia
4 in 1936, it disqualified such a broad class of people.

5 Nor was there any distinction between strikers
6 and financiers in the sample statute promulgated by the
7 Social Security Board in January of 1936. The Social
8 Security Board, the agency created by the act, disqualified
9 persons participating in, financing or directly interested
10 in the strike that caused their unemployment.

11 QUESTION: Mr. Cohen, do you think it makes
12 any difference whether the non-striking workers have a
13 direct interest in the issues of local strikes?

14 MR. COHEN: I think that Michigan was entitled
15 to decide, as its legislature and its courts have, that
16 non-striking workers who pay extraordinary dues that can
17 be expected to finance other people's local strikes under
18 circumstances where it is foreseeable that that will cause
19 lay offs in their own plants, Michigan is entitled to
20 disqualify those people. That is the basis.

21 QUESTION: So, you would employ a foreseeability
22 statement?

23 MR. COHEN: Well, I think the State of Michigan
24 employed a foreseeability standard. I think that Congress
25 permitted them to do that.

1 QUESTION: And, did Congress care whether it
2 was foreseeable?

3 MR. COHEN: Well, I think that Congress should
4 be assumed to have cared about the policy of non-state
5 intervention in a labor dispute that is going on.

6 And, I think what Michigan did here was to find
7 that these employees were sufficiently directly involved
8 with the labor dispute that was going on, that payment
9 of benefits to them could constitute intervention which
10 they were entitled not to do.

11 QUESTION: Do you think that payment of regular
12 dues could be financing in Congress' view?

13 MR. COHEN: I want to agree with Mr. Nash that
14 that is not this case, disagree with him to the extent
15 of saying I think probably not. I think that the rationale
16 that the -- The purpose of Congress in the two statutes
17 was to permit the states to decide what they wished to
18 do in this specific -- on the specific question of providing
19 assistance in the context of a labor dispute does not
20 extend to a disqualification because of the payment of
21 regular dues.

22 QUESTION: It is an illusive distinction somewhat
23 though, isn't it?

24 MR. COHEN: Well, I think as usual there is
25 a grey area. I think Michigan worked for 20 years to

1 draw the line and it drew a correct one. I think there
2 is a distinction between a decision not to finance people
3 who are directly involved in a particular labor dispute
4 to the extent that these were -- and a decision to deny
5 benefits to people who are union members or have paid
6 regular dues because it happened that some of those dues
7 found their way into the hands of strikers. Michigan
8 was careful not to do that.

9 I wanted to say a word about the question of
10 whether this action was voluntary. I think it is clear
11 that among other things this Court's decision in the Hodory
12 case and all of the legislative history that I have recited
13 that voluntariness is not a requirement of the federal
14 statute; that is a state is not required to find that
15 a worker is voluntarily unemployed before it may disqualify
16 him.

17 I also think that voluntariness is an illusive
18 notion in the context of what are inherently collective
19 activities in which individuals may feel subject to varying
20 pressures.

21 For example, the decision by an individual not
22 to participate in a strike could well be a violation of
23 union rules subjecting him to some sort of discipline,
24 but would -- But, it is nevertheless clear, I think, that
25 states may deny benefits to people engaged in the voluntary

1 activity of striking.

2 Thank you.

3 CHIEF JUSTICE BURGER: Do you have anything
4 further, Mr. Rossen? You have seven minutes remaining.

5 MR. ROSSEN: A few things, Your Honor, if I
6 may.

7 ORAL ARGUMENT OF JORDAN ROSSEN, ESQ.

8 ON BEHALF OF THE APPELLANTS -- REBUTTAL

9 MR. ROSSEN: Mr. Cohen may not think it is
10 important if it is voluntary, but Justice Ryan in his
11 opinion for the three justices of the Michigan Court said
12 that it was necessary to find voluntariness before you
13 disqualify people for financing.

14 QUESTION: Was that a construction of the Michigan
15 law or a description of what Congress had permitted?

16 MR. ROSSEN: It was a construction of the Michigan
17 law, not what Congress meant, and the reason I am making
18 the point, Justice Rehnquist, is that in order to find
19 voluntariness of these Appellants, Justice Ryan said they
20 will be presumed to have done this voluntarily if they
21 paid these dues in accordance with the union's rules and
22 constitution.

23 So, I think the whole thing is tied up and it
24 is not so much a question of whether the dues are regular
25 or irregular, it is the question -- We say it is whether

1 the dues were required to maintain membership, whether
2 they were proper under Lander and Griffin --

3 QUESTION: But, in order to make it a proper
4 part of the federal question that you have brought here,
5 you have to show that Congress' tolerance of them, or
6 whatever you want to say, would depend to some extent
7 on their voluntariness. The fact that it may be an incorrect
8 finding of fact under Michigan law as to voluntariness
9 certainly wouldn't be something we would review.

10 MR. ROSSEN: I definitely am not rearguing Hodory,
11 Justice Rehnquist. I am not saying that you cannot dis-
12 qualify people in a labor dispute section under all
13 circumstances.

14 For example, the other two counsel talked about
15 the single establishment situation of which Congress was
16 aware in 1935 where you disqualified everyone in the
17 establishment or who were laid off due to a labor dispute.
18 That might mean disqualifying people even though they
19 were involuntarily out of work.

20 We agree that this could happen, but the difference
21 is in that situation you disqualify union members and
22 non-union members alike and you don't base the disqualificati
23 on their exercise of any Section 7 right, you just dis-
24 qualify everyone in the establishment.

25 And, Your Honors held in Hodory whether or not

1 that is fair that is certainly lawful. And, we don't
2 quarrel with that decision. That does not involve Section
3 7 rights.

4 The question -- Both counsel -- The United States
5 didn't do it in its brief, but both counsel use what we
6 call a countervailing machinist's argument and say that
7 GM is hampered economically somehow if you pay these non-
8 strikers, and that therefore you should let Michigan impede
9 their expressed Section 7 rights.

10 The economic effect on GM's ability to conduct
11 the foundry strikes does not justify impeding these Section
12 7 rights.

13 When Congress provides for a Section 7 protected
14 right, by definition Congress also tolerates some implicit
15 economic effect on the employer or someone else. So,
16 you can't say this amounts to the type of congressional
17 intent that this Court found in New York Telephone where
18 there was an expressed awareness of these things.

19 In effect, if you look at congressional intent,
20 in 1935, the state statutes that were then in existence
21 paid unemployment compensation to non-strikers at other
22 locations who were laid off during strikes.

23 So, if there is any economic imbalance here,
24 Congress was probably aware of it. I mean, traditionally
25 unemployment compensation is paid to people who are laid

1 off due to other situations.

2 And, when they say, in response to Justice
3 Marshall's question, that somehow these claimants con-
4 tributed to their unemployment, it is a little far-fetched,
5 we think, to say that when they paid \$40 in October 1967
6 this caused a shortage of castings at the foundries in
7 January 1968. I mean, I don't think anyone -- Certainly
8 there is no finding below to support that unusual theory.

9 Nor is there a finding below to support GM's
10 arguments that these Claimants were allied with the foundry
11 workers. GM's economic balance argument is based on facts
12 that don't exist here and, as Justice O'Connor, I believe --
13 Her questions indicate some concern about this. If these
14 Appellants had been in league with the foundry workers,
15 closely allied with them or had there been a national
16 contract that was open that could have possibly benefited
17 them, they would have been disqualified under other
18 Michigan statute sections anyway. You wouldn't reach
19 these issues here and states generally take care of those
20 concerns.

21 So, apart from the fact thtat General Motors'
22 argument is purely speculative, if you look at it at all,
23 Michigan takes care of these things. Michigan avoids
24 the economic imbalance problem that was in New York Telephone
25 by denying benefits to strikers and that is a fairly effective

1 way of avoiding it.

2 QUESTION: But they can pay it.

3 MR. ROSSEN: They could pay strikers?

4 QUESTION: Couldn't they?

5 MR. ROSSEN: I am not sure. Your Honor held --
6 This Court held in New York Telephone that they could
7 pay strikers after eight weeks. The government argued
8 in New York Telephone that it would be such an outrage
9 to pay strikers from the beginning, and the dissents pointed
10 that out too, that I am not sure what this Court would
11 do with a case involving a state that paid benefits from
12 the first day to strikers. I really don't.

13 The basis of the decision in New York Telephone
14 was that Congress was aware of that specific New York
15 statute.

16 QUESTION: So, you think the policy of so-called
17 neutrality is pretty strong?

18 MR. ROSSEN: Well, I don't think this case involves
19 affecting neutrality certainly in any way that hurts General
20 Motors regardless of what you do.

21 When you impede an express Section 7 right,
22 not you personally, but when the state does, that action
23 is preempted unless you find congressional intent to permit
24 it. And, you don't even have to get to any questions
25 of neutrality. Congress took care of the neutrality

1 argument when it said in the NLRA preamble --

2 QUESTION: What if the state just denies payments
3 to strikers from the very first day?

4 MR. ROSSEN: That would be permitted because --

5 QUESTION: Well, it certainly reads on Section 7
6 rights.

7 MR. ROSSEN: It does, Your Honor, and --

8 QUESTION: Why can they do it?

9 MR. ROSSEN: They can do that because you held --

10 QUESTION: Because of this strong policy of ,
11 neutrality.

12 MR. ROSSEN: No, that is not why they can do
13 it.

14 QUESTION: What is it?

15 MR. ROSSEN: They can do it because this Court
16 held that Congress intended to permit it --

17 QUESTION: Yes.

18 MR. ROSSEN: -- because Congress was aware in
19 1935 of statutes that did that expressly. The New York
20 statute denied benefits to strikers for eight weeks.
21 Other statutes denied benefits to strikers from the beginning
22 and that is why --

23 QUESTION: Where was the evidence found in New
24 York, both in the NLRA and the Social Security Act?

25 MR. ROSSEN: Well, this Court held that the

1 NLRA didn't indicate that you could affect these rights
2 one way or the other, but this Court looked to the Social
3 Security Act, I believe, and the fact that the New York
4 statute in question was on the books at the time that
5 Congress passed the Social Security Act in 1935. That
6 is where this Court found there was congressional intent
7 or at least some of the Justices.

8 CHIEF JUSTICE BURGER: Your time has expired,
9 counsel.

10 MR. ROSSEN: I did the same thing last week.
11 I covered up the red light with my --

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

14 (Whereupon, at 1:38 p.m., the case in the above-
15 entitled matter was submitted.)
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CERTIFICATION

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

#85-117 - A. G. BAKER, JR., ET AL., Appellants V GENERAL MOTORS CORPORATION

AND MICHIGAN EMPLOYMENT SECURITY COMMISSION

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

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