

ORIGINAL

TRANSCRIPT OF PROCEEDINGS

IN THE SUPREME COURT OF THE UNITED STATES

In the Matter of:

REGENTS OF THE UNIVERSITY OF
CALIFORNIA,

Appellant,

v.

PUBLIC EMPLOYMENT RELATIONS
BOARD, ET AL.

LIBRARY
SUPREME COURT, U.S.
WASHINGTON, D.C. 20543

No. 86-935

PAGES: 1 through 44

PLACE: Washington, D.C.

DATE: January 12, 1988

Heritage Reporting Corporation

Official Reporters
1220 L Street, N.W.
Washington, D.C. 20005
(202) 628-4888

1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----x
3 REGENTS OF THE UNIVERSITY OF :
4 CALIFORNIA, :
5 Appellant, :
6 V. : No. 86-935
7 PUBLIC EMPLOYMENT RELATIONS :
8 BOARD, ET AL. :

9 -----x
10 Washington, D.C.

11 Tuesday, January 12, 1988

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 2:00 p.m.

15 APPEARANCES:

16 JAMES N. ODLE, ESQ., Berkeley, California, on behalf of the
17 Appellant.

18 CHRISTOPHER J. WRIGHT, ESQ., Assistant to the Solicitor
19 General, U.S. Department of Justice, Washington, D.C.,
20 as Amicus Curiae, in Support of Appellant.

21 ANDREA L. BIREN, ESQ., San Francisco, California, on behalf
22 of the Appellees.

C O N T E N T S

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

ORAL ARGUMENT OF

PAGE

JAMES N. ODLE, Esq.

On behalf of Appellant

3

CHRISTOPHER J. WRIGHT, Esq.

As Amicus Curiae in Support of Appellant

15

ANDREA L. BIREN, Esq.

On behalf of Appellees

25

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

2 CHIEF JUSTICE REHNQUIST: We will hear argument next
3 in Number 86-935, Regents of the University of California v.
4 Public Employment Relations Board, Et Al.

5 Mr. Odle, you may proceed whenever you are ready.

6 ORAL ARGUMENT OF JAMES N. ODLE, ESQUIRE

7 ON BEHALF OF APPELLANT

8 MR. ODLE: Mr. Chief Justice, and may it please the
9 Court:

10 Most people that I know would not buy a stamp if they
11 could get their letters delivered without one. This case is
12 about whether a labor Union can get its letter delivered across
13 postal routes without a stamp.

14 The United States Postal Service does not think so.
15 Neither does the University of California. But the PERB, that
16 is the California Public Employment Relations Board, and the
17 California Court of Appeal, have found that California law
18 requires the University to deliver that letter.

19 The Federal body of law known as the Private Express
20 Statutes generally prohibits delivery of mail in competition
21 with the Postal Service.

22 PERB argues that two exceptions apply here. These
23 are the letters of the carrier exception and the private hands
24 without compensation exception.

25 This is a technical case, in that it turns on careful

1 reading of those exceptions. But while it is a technical case,
2 it is an important one, because there are millions of dollars
3 of Postal Service revenue at stake here.

4 QUESTION: Isn't it going to cost the University some
5 money either way?

6 MR. ODLE: It will cost the University perhaps some
7 money in that there may be more letters sent.

8 QUESTION: But it will cost the Postal Service, is
9 that it?

10 MR. ODLE: It will cost the Postal Service a lot of
11 money.

12 QUESTION: Thanks.

13 QUESTION: Of course, it will also save them a lot of
14 work, too, won't it?

15 MR. ODLE: It will not save them very much, actually.

16 QUESTION: It will save all the work involved in
17 delivering this mail from where it is given to your client to
18 deliver to the Union people, won't it?

19 QUESTION: And if they are losing money on delivery
20 now so that they need postal rate increases, they will actually
21 be better off.

22 MR. ODLE: Justice Scalia, I don't think they are
23 losing money on this kind of delivery. There is a single
24 postal rate whether you send a letter from Maine to California
25 or across Berkeley. And this is mail sent, the letters in this

1 case would have been sent from a location in the City of
2 Berkeley to the University in Berkeley, and it probably would
3 not have 22 cents a letter to deliver those.

4 QUESTION: I thought they were delivered throughout
5 the University system? Are all the deliveries in Berkeley?

6 MR. ODLE: The case arose over deliveries in
7 Berkeley, but I think that you are right, Justice Stevens, that
8 at stake here is a larger mail system.

9 QUESTION: It is a big State and there are a lot of
10 branches of the University.

11 MR. ODLE: That is right.

12 QUESTION: Will how we decide this case help me to
13 get my mail faster?

14 MR. ODLE: Yes, it will, Justice Marshall.

15 QUESTION: Do you really think so?

16 MR. ODLE: I do. Or at least, I take that back, it
17 may, what it may do is make your mail slower. I doubt that it
18 will make it faster.

19 The amici, in this case, by their own account,
20 represent some 3,500,000 employees, to whom they are eager to
21 deliver unstamped letters.

22 QUESTION: 3,500,000 employees of what?

23 MR. ODLE: These are employees of employers across
24 the country.

25 QUESTION: Oh, I see. I see.

1 MR. ODLE: The Union represents those employees.

2 QUESTION: Employers who would be in the position of
3 the University?

4 MR. ODLE: I believe so.

5 QUESTION: Yes.

6 MR. ODLE: It has to be recognized that if the Postal
7 Service loses the revenue from those letters, other patrons of
8 the Postal Service are going to have to pay for it, either in
9 lower quality of service or in higher rates.

10 And, Justice Marshall, I would suggest that you would
11 pay for it in lower quality of service.

12 Let me talk about the two exceptions.

13 The letters of the carrier exception is the exceptio
14 that allows the University to deliver its own letters without a
15 stamp.

16 The language of that exception and the legislative
17 history of it I think have been very thoroughly briefed. We
18 think it is clear that the exception applies to letters sent by
19 or addressed to the carrier -- in this case, the University.

20 QUESTION: You think it is clear from the language?

21 MR. ODLE: I think it is very clear from the language
22 of the regulation, Justice Scalia.

23 QUESTION: Let's talk about the regulation. You urge
24 that we must give deference to the regulation. We give
25 deference to the regulations of agencies that are charged with

1 the administration of particular schemes.

2 But it seems to me that the Post Office is not
3 charged with administration of this law prohibiting persons
4 other than the Post Office from carrying mail. That is like
5 saying that the Attorney General is charged with administration
6 of the criminal laws so we should defer to the prosecutor's
7 determination of what a criminal law means.

8 You are not administering this statute at all. It
9 would be very strange to say you are administering it. To the
10 contrary, you are the chief competitor of those who are trying
11 to avoid the statute.

12 Why should we give you deference?

13 MR. ODLE: It is certainly true that the Postal
14 Service is the chief competitor of those who would deliver it
15 in competition with the Postal Service.

16 The Postal Service, however, it seems to me, does
17 administer the statute, in fact. It is authorized by Congress,
18 for example, to suspend the operation of the statute in what
19 the Postal Service considers to be appropriate cases. And it
20 writes suspensions of the statute which specifically enable
21 others to deliver letters which the Postal Service would
22 otherwise deliver itself.

23 QUESTION: What provision is that that enables them
24 to do that?

25 MR. ODLE: I can point you to the Code of Federal

1 Regulations sections in which the suspensions are written. The
2 legislation is in Section 601. The Postal Service may suspend
3 the operation of any part of this section upon any mail route
4 where the public interest requires the suspension.

5 That is Section 601, 39 U.S.C.

6 QUESTION: Thank you.

7 MR. ODLE: The letters of the carrier regulation
8 provides that the sending or carrying of letters is permissible
9 if they are sent by or addressed to the person carrying them.

10 Now, the regulations recognize that "person" for this
11 purpose may be an institution. And the regulations also
12 recognize that when a letter is sent by or addressed to an
13 institution it is going to have to be carried by some
14 individual. So the regulation provides, and I am reading here:
15 "If the individual actually carrying the letters is not the
16 person sending the letters or to whom the letters are
17 addressed, then such individual must be an officer or employee
18 of such person."

19 In other words, the individual who actually carries
20 the letter must be an officer or employe of the institution
21 sending them or to whom they are addressed.

22 Now, the person carrying these letters is an employe
23 of the University.

24 When a third party, like a Union, sends a letter, the
25 sender is the third party.

1 So the issue is, is the University the receiver of
2 that letter?

3 And the answer is, it depends.

4 If the letter is sent to someone who receives it as
5 an agent for the University, who receives it on behalf of the
6 University, it makes sense to call that a letter to the
7 University.

8 If the person who receives that letter doesn't
9 receive it as an agent of the University, but receives it on
10 his own behalf, it is not a letter to the University.

11 For example, if, as the University's lawyer, if I
12 receive a letter from the Union about this case, I receive that
13 letter on behalf of the University and it is a letter to the
14 University.

15 If I receive a letter from a Union saying Mr. Odle,
16 we think you ought to join the Union and authorize it to
17 bargain on your behalf with the University and try to get you a
18 higher wage and maybe strike against the University if you
19 don't get it, that is not a letter to the University. That is
20 a letter to me.

21 QUESTION: Mr. Odle, I thought that the State
22 legislature in California has determined that providing Unions
23 access to the internal mail of the mail system is the current
24 business of the University, or has made some effort
25 legislatively to say that it is defining the business of the

1 university as including this.

2 Now, what do we do with that?

3 MR. ODLE: Well, you realize first that the
4 regulation states a two-part test.

5 The letter must relate to the current business of the
6 University and it must be to or from the University.

7 QUESTION: Well, of course, the statute itself,
8 Section 1694, refers to, as the exception, except such as
9 relates to the current business of the carrier.

10 MR. ODLE: That is right. And I believe that the
11 intent in enacting that statute in 1909, as we have argued in
12 the brief, was to codify an Opinion of the Attorney General
13 dated 1896.

14 QUESTION: Is that your interpretation of the
15 regulation and the validity of it? You would not fall within
16 the letters of the carrier exception? You depend on the
17 regulation totally, I gather.

18 MR. ODLE: I think we would if we read the statute
19 properly. I think that we would fall, that these letters would
20 fall outside of the intent of the statute, if that is your
21 question.

22 I think that because the Attorney General's Opinion
23 which preceded the statute is very clear and I think the
24 legislative history is very clear that what Congress meant was
25 to embody that opinion in the statute. And there is another

1 Attorney General's Opinion a year later, in 1910, which says
2 that that is what Congress meant and that is what it did. And
3 that law has been on the books in that form ever since.

4 QUESTION: It would have been so easy to say that,
5 though. It would have been so easy to say except letters
6 addressed to or from a business and relating to its business.
7 It is not as though it is difficult to describe what you say
8 they meant. They just didn't put it that way. They just said
9 it has to relate to the business.

10 MR. ODLE: That is true, Justice Scalia. And I don't
11 know why they did not put it that way. I do know that Congress
12 was told by other Congressmen, by Congressmen who were
13 instrumental in promoting the 1909 legislation, that it would in
14 fact embody the Attorney General's Opinion.

15 But as to why they felt it was not necessary to go
16 into that detail, I don't know. I think they felt that they
17 read this phrase, relates to the current business, in a
18 somewhat narrower way than it could be read. Why that is, I am
19 not sure.

20 As further evidence that the letter is not a letter
21 to the University, if more evidence of that is needed, it seems
22 pretty clear that it would violate California labor law for the
23 University to read that letter, just as it would violate
24 Federal law for an employer covered by the National Labor
25 Relations Act, to read such a letter from a Union to the

1 employee.

2 PERB argues that if the letters of the carrier
3 exception doesn't apply, the private hands without compensation
4 exception does.

5 The problem with that is that the University is
6 compensated. We receive money from the California Legislature
7 which pays for the operation of the mail system. And the
8 California Legislature is also the entity that has ordered us
9 to deliver the mail.

10 It just offends common sense to say that mail which
11 is ordered and paid for by the same entity is not compensated.

12 PERB argues that the intent is the key here, that if
13 the intent is to compete, the exception does not apply but if
14 there is another intent, it may apply.

15 The problem is that the California intent here, the
16 Legislature's intent, is clearly to withhold revenue from the
17 Postal Service. The purpose is to facilitate communication,
18 but to facilitate it in just one way -- by making it cheaper.

19 It is sophistry to say that the Legislature intends
20 to save significant dollars for the Unions but doesn't intend
21 to withhold significant dollars from the Postal Service when
22 they are the very same dollars.

23 Anyone setting up to compete with the Postal Service
24 on more economical routes like these could claim to be
25 facilitating communication by making it cheaper. The problem

1 is that there has been a national decision, there should be a
2 national postal rate, there should be a Postal Service to
3 accomplish that. And to preserve that service, it is necessary
4 to say you cannot compete with it unless you fall under one of
5 the exceptions.

6 Those exceptions are to be made by Congress, not by
7 the California Legislature.

8 QUESTION: Counsel, it is still not clear to me how
9 many people use this system.

10 MR. ODLE: The University of California has about
11 100,000 employees. We use the system to deliver our own mail.
12 That is, mail sent to or from the University of California
13 employees.

14 QUESTION: What if a professor wants to send a letter
15 to another professor down the hall?

16 MR. ODLE: If it is down the hall, he probably
17 carries it. He may send it through the University's mail
18 system. It may not be involved with these laws, because it has
19 to cross a Postal Route to be subject to these laws.

20 QUESTION: It can be mailed by the same system. Why
21 do you draw the line between the professor and the other
22 people?

23 MR. ODLE: Because if the professor's letter is sent
24 to another university employee on the business, that is, as a
25 representative of the University, it is a letter to the

1 University.

2 The problem is that the Union letters are not.

3 QUESTION: If a professor is writing to another
4 professor about a third professor at Harvard, that involves the
5 University?

6 MR. ODLE: I would say it depends, Justice Marshall,
7 if I may just take a moment to answer.

8 QUESTION: Because if you take Harvard, I'm going to
9 go to Oxford.

10 MR. ODLE: Let us suppose that the professor at
11 Harvard has applied for a job, and one professor writes to
12 another and says he is good, I think you ought to hire him.
13 That would be a letter to the University.

14 On the other hand --

15 QUESTION: What if he asks him how about his Union
16 business? What does he think of his Union?

17 MR. ODLE: I don't think that would be a letter to
18 the University and I don't think it could be carried by the
19 University.

20 QUESTION: This is to another professor?

21 MR. ODLE: That's right.

22 QUESTION: I am writing to you to find out how is Joe
23 Droke's standing with the Union.

24 MR. ODLE: Unless you wanted to know that in order to
25 conduct University business, your letter would not be a letter

1 of the University. You could write to that other professor
2 asking him if he wants to join you for Halloween, and that
3 would not be a letter of the University.

4 QUESTION: Isn't it? Isn't that University business?

5 MR. ODLE: I think the answer to that is more
6 complicated than yes or no. Certainly, collective bargaining
7 is the University's business in the sense that we engage in it,
8 we hire people to do it, and if there is a letter from our
9 collective bargainer, to the President of the University, about
10 Union negotiations, that is certainly a letter of the
11 University.

12 But the issue here is, if there is a letter from the
13 Union encouraging an employee to join the Union, is that a
14 letter to the University? And we think it is not.

15 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Odle. We
16 will hear now from you, Mr. Wright.

17 ORAL ARGUMENT OF CHRISTOPHER J. WRIGHT, ESQUIRE

18 AS AMICUS CURIAE IN SUPPORT OF APPELLANT

19 MR. WRIGHT: Mr. Chief Justice, and may it please
20 the Court:

21 Broad constructions of the private express statutes
22 like the decision of the Court of Appeal below do reduce the
23 scope of the Postal monopoly and threaten to reduce Postal
24 revenues.

25 As Mr. Odle said, the fact that three and a half

1 million employees are represented by the amici in this case
2 shows that a substantial amount of mail could be diverted from
3 the Postal Service.

4 QUESTION: Mr. Wright, what authority does the Postal
5 Service have to issue this regulation?

6 MR. WRIGHT: Section 401, 39 U.S.C. 401, which is
7 quoted in a footnote on Page 23 of our brief.

8 QUESTION: So you think that authority to issue that
9 regulation entitles the Postal Service interpretation of the
10 statute to some deference?

11 MR. WRIGHT: I certainly do.

12 The statute says that the Postal Service has
13 authority to adopt, amend, and repeal such rules and
14 regulations as it deems necessary to accomplish the objectives
15 of this title, which include the private express statutes.

16 Congress has quite clearly given the Postal Service
17 authority to define what these statutes mean.

18 It is true that the Postal Service is also the
19 beneficiary of this statute. I take that to mean that Congress
20 would not expect the most liberal interpretation of the
21 statute. It would expect the contrary.

22 QUESTION: How long has the Postal Service
23 interpreted this Act that way? Forever?

24 MR. WRIGHT: Yes. In turning to the letters of the
25 carrier exception, this is a classic case of deference. This

1 is a long standing interpretation that was originally
2 formulated contemporaneously with the relevant statutory
3 amendment which was in 1909, and it has been consistently
4 followed ever since.

5 I would like to go through that briefly, the
6 legislative history.

7 First, let me note, the words of the statute are
8 ambiguous. It could be construed the way the Postal Service
9 has done it. It could be construed the way the Court of
10 Appeals has done it.

11 I would say that the issue here is whether letters to
12 institutions can only be sent to their representatives. That
13 is the way the Postal Service has construed it, and the issue
14 is whether they have properly done so.

15 I would think that the language of the statute
16 letters relating to the current business of the carrier would
17 normally be sent to representatives, would not be sent to
18 someone else in the case of an institution.

19 It is true that you can define the business of
20 something like a university very broadly and include almost
21 everything, including the letters here.

22 So I start with the proposition that the language is
23 ambiguous.

24 But this is a case where the legislative history is
25 very, very clear. In the 1896 Attorney General Opinion letter

1 that was referred to, the Attorney General concluded, despite
2 the lack of a basis in the language of the private express
3 statutes at that time, that a railroad could carry its own
4 letters.

5 He said that the right he identified was quote:
6 "...to carry letters written and sent by the officers and
7 agents of the railroad company which carries and delivers them,
8 about its business, and these only." Unquote.

9 He added that: "...companies could not carry letters
10 that are neither written by that company nor addressed to it."
11 Unquote.

12 IN 1909, when Congress added the language at issue
13 here, the principal proponent of the amendment was Senator
14 Bacon. And he wanted to revise the statute to express in exact
15 language what the Attorney General says it means.

16 The Senator who actually proposed the language of the
17 amendment was Senator Sutherland, and he said that that was its
18 purpose. And the Conference Report, which was printed in the
19 Congressional Record at that time said that it put the statute
20 quote: "...in exact conformity with the construction placed
21 upon existing law." Unquote. And then referred to Attorney
22 General Harmon's 1896 Opinion letter.

23 Legislative history is rarely this clear. But there
24 can be no question that Congress intended to codify the 1896
25 Opinion which stated that railroads could carry letters sent to

1 or by its officers and agents but not letters that are neither
2 written by nor sent to the company.

3 QUESTION: Mr. Wright, educate me, because I speak
4 from ignorance.

5 In the last decade or so, we have seen a
6 proliferation of Federal Express and Emory and all these other
7 overnight carriers.

8 Do they operate under some special statute?

9 MR. WRIGHT: Yes. The Postal Service is also
10 authorized to suspend the operation of the statutes where the
11 public interest so requires.

12 In 1979, it did so for extremely urgent letters which
13 are defined in the regulations basically to be letters that
14 cost a certain multiple of normal postage. It is a
15 regulatory suspension under which Federal Express operates.

16 QUESTION: It seems to me that this is devastating
17 competition to the Postal Service.

18 MR. WRIGHT: The legislative history of the 1979
19 amendment -- we cited the hearings in our brief -- the Postal
20 Service adopted that suspension somewhat reluctantly. I think
21 it is fair to say that Congress would have enacted it
22 statutorily if the Postal Service had not come up with a
23 regulation. But it did and that solved the problem.

24 PERB suggests that its interpretation of the private
25 express statute warrants deference. We think that that is

1 plainly wrong. Its interpretation of the California statute
2 that says that Unions can use -- the California statute says
3 that Unions can use -- the means of communication of employers.
4 PERB has construed that to mean internal mail systems.

5 We have not quarreled with that. That is entitled to
6 deference.

7 But Congress gave the Postal Service, in Section
8 401, the authority to construe the private express statutes.
9 It didn't give that authority to PERB.

10 I would like to turn to the other exception that PERB
11 says authorizes the deliver here, the private hands without
12 compensation exception.

13 This is another long standing exception. The precise
14 language dates back to 1845, the private hands without
15 compensation.

16 In 1846, a District Court stated that a deliverer of
17 merchandise could not also deliver letters even though it did
18 not make any separate charge for the delivery. And the Postal
19 Service has followed that interpretation ever since.

20 More recently, in the 1970s, a number of cases came
21 up involving school districts who wanted to deliver Union
22 letters, very similar cases to this one.

23 In some of these cases, collective bargaining
24 agreements spelled out a duty to carry the Union's letters. IN
25 those cases, I think it is clear beyond doubt, and I do not

1 understand PERB to disagree, that compensation was involved.

2 As the prior case demonstrates, employers and Unions
3 are in an adversarial relationship.

4 QUESTION: Mr. Wright, what is the compensation in
5 this case?

6 MR. WRIGHT: There are three different kinds of
7 compensation here.

8 First, this is all part of a bargain under which the
9 employees give their labor to the University.

10 QUESTION: But it is a statutory requirement, isn't
11 it, that they do this?

12 MR. WRIGHT: If there was a statutory requirement
13 that the University's dental school give free service to Union
14 employees, or just employees of the University, I do not think
15 there would be any question that that would arise out of the
16 employment relationship, and the compensation to the University
17 of the employees' labor was compensation whether or not it was
18 statutory or contractual.

19 QUESTION: Tell me again, what is the compensation to
20 the University for doing this?

21 MR. WRIGHT: Three things. Our first argument is
22 that it is the labor of the employees, and their agent, the
23 employees' agent, the Union, gets to send these letters.

24 QUESTION: It is like a fringe benefit for the
25 employees?

1 MR. WRIGHT: Exactly.

2 QUESTION: You don't have any cases that are remotely
3 like? I mean, I can understand the theory of what you are
4 saying, but that is quite different from any of your
5 precedents.

6 MR. WRIGHT: This is a unique case, because the State
7 has ordered the carrying.

8 QUESTION: Yes.

9 MR. WRIGHT: Second, the fact is that the State is
10 the employer here, and it is just like the school district
11 cases, in our view, except that the Unions go and negotiate
12 with the legislature rather than directly with the University.
13 They've gone up a step.

14 We think that that is clear, if you look at the next
15 case.

16 QUESTION: I still don't understand. What I am
17 asking is, what is the compensation? One thing you say, the
18 compensation is the services of the employees who receive the
19 mail.

20 MR. WRIGHT: Right.

21 QUESTION: That's the compensation. Now, you said
22 there are two other things that might be compensation.

23 MR. WRIGHT: Our next answer is that this is just
24 like the school district cases. If the Union had bargained a
25 contract provision, if you will grant me that there is clearly

1 compensation there, if an employer agrees to deliver an Union's
2 mail --

3 QUESTION: In exchange for what? What is the
4 compensation?

5 MR. WRIGHT: Presumably it is agreeing to some other
6 demand in the collective bargaining agreement. It is usually
7 implicit. It is not spelled out. In this case, they've got
8 that through the legislature. In the next case, if we should
9 lose this case, the Unions will go to State legislatures and
10 say, you can give us a big benefit. We will save a lot of
11 money if we can use internal mail systems, and this will cost
12 you very little. Please pass a law.

13 QUESTION: You are saying that this exception would
14 not apply if I asked a friend to deliver a mail to someone, he
15 is going to Chicago on an airplane and I say would you take a
16 letter along and he says yes, I'll do it for you if you'll do
17 the same thing for me a week from now on the return trip, then
18 they have to pay postage?

19 MR. WRIGHT: We would say there is compensation here.
20 As it happens, the special messenger exception to the private
21 express statutes would cover that, in any other case where he
22 was handling fewer than 25 letters. But the private hands
23 without compensation exception would not apply there. There
24 would be compensation.

25 QUESTION: Now, what is your third compensation?

1 MR. WRIGHT: The third case is, PERB says we're
2 wrong. It says you are wrong to say the State is the employer.
3 The State and the University are different.

4 But if that is true, then it is even more clear that
5 it is compensation, that there is compensation here, because
6 the University is both ordering them to carry mail and paying
7 for it, because it funds the University.

8 QUESTION: I take it there is always some expense to
9 the private carrier making the delivery. The fact that he has
10 to pay his own bills cannot make it.

11 MR. WRIGHT: But it is different if the person
12 ordering it also pays for it.

13 If I ask you to deliver a letter and give you money
14 to do it, even if it is a letter from someone else and being
15 received by someone else, even if it is not my letter, if I am
16 both telling you to pay for it and paying you to do so, I am
17 compensating you for that.

18 QUESTION: Mr. Wright, may I inquire whether you
19 think we owe the same degree of deference to an agency's
20 interpretation or construction of a statute by regulation if
21 the effect of it is to pre-empt State law?

22 MR. WRIGHT: Yes, we think so.

23 I would like to make one other point. PERB has also
24 argued that the Postal Service has not been consistent in its
25 application of these statutes, relying on an Indianapolis cased

1 where the Postal Service said that a school district could
2 carry letters from a community service group to students about
3 Food Stamp programs.

4 We think it quite clear that there is no form of
5 compensation there. None of the three forms of compensation
6 that I mentioned briefly a moment ago or in more detail in our
7 brief would apply.

8 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Wright. We
9 will hear now from you, Ms. Biren.

10 ORAL ARGUMENT OF ANDREA L. BIREN, ESQUIRE

11 ON BEHALF OF APPELLEES

12 MS. BIREN: Mr. Chief Justice, may it please the
13 Court:

14 The question here is whether California's strong
15 State interest in efficient communication and effective
16 communication between employees and their representatives as
17 codified in HEERA can be harmonized with the private express
18 statutes.

19 The State has determined that the University of
20 California has a statutory duty to allow employee organizations
21 to carry this mail to employees in order to make the HEERA
22 scheme of cooperative labor relations effective.

23 The private express statutes, we submit, can be
24 harmonized with the State law by using either one of the two
25 exceptions that have been discussed this afternoon, the

1 business of the carrier exception or the private hands without
2 compensation exception.

3 Postage foregone under one of these exceptions is
4 postage forgone pursuant to Congressional design.

5 QUESTION: Ms. Biren, let me ask you. Supposing if
6 the 3,500,000 were filing an amicus brief here all succeed in
7 getting what you say the University of California employees
8 get, do you think that would be pursuant to Congressional
9 design?

10 MS. BIREN: First of all, I think it is not the least
11 bit clear that all 3,500,000 of them would be covered under a
12 decision in our favor in this case.

13 We have relied substantially on a specific statute
14 here, HEERA, which really sets up a very cooperative labor
15 relations scheme in which the employees are supposed to be
16 allowed the fullest participation possible through their
17 employee organizations in the determinations of conditions of
18 employment, and there is an access statute which specifically
19 says that these employees can hear from their employee
20 organizations through the mail system.

21 That is not the case in many states represented by
22 amici.

23 QUESTION: What difference does that make in
24 interpreting the provisions here?

25 MS. BIREN: If you were particularly bothered by the

1 fact that --

2 QUESTION: Let's assume you accept the regulation.
3 Do you think that this means that these State law provisions
4 take these deliveries out of the regulation?

5 MS. BIREN: I think that these deliveries are within
6 both the statute and the regulation.

7 QUESTION: Because the employees, the recipients, are
8 agents of the University?

9 MS. BIREN: For several reasons.

10 First, I think --

11 QUESTION: But in terms of the regulation.

12 MS. BIREN: In terms of the regulation, that is what
13 I am going to talk about. As I said, here is a cooperative
14 labor relations scheme in which the employees are part of the
15 decision making on something that is patently the business of
16 the carrier -- the terms and conditions of employment of the
17 employees.

18 Through their representatives, they participate in
19 bargaining over this.

20 Therefore, as to this particular business of the
21 University -- labor relations, the determination of terms and
22 conditions of employment -- these employees are equal partners
23 in that decision making, and their representatives, therefore,
24 are their agents. They are their agents. And I think it is
25 stretching it, but I think in a broader view, if you insisted

1 upon the agency concept, which I do not think is present in
2 either the statute or the regulation, you could say that they
3 are the agents of the University as a whole in fulfilling its
4 total duty under HEERA to allow employees to participate to the
5 fullest extent in the labor relations scheme.

6 I have made one of the points I wanted to make,
7 regarding carriage, at issue here, being within the statute and
8 the regulation, because of the carrier's business.

9 The other point that I would go into at more length
10 is under the private hands without compensation exception, to
11 show that the University is not private hands, because it is
12 not the Postal Service, and there is no compensation for
13 carriage because compensation has traditionally been
14 interpreted as money, identifiable goods or services, and
15 lately, since 1976, good will, flowing between the user and the
16 carrier.

17 State funding does not meet that description. State
18 funding is not compensation, within the intent of Congress when
19 it passed the private hands without compensation exception.

20 QUESTION: When you say State funding, I mean, did
21 the California legislature appropriate money to the University
22 of California to perform these services?

23 MS. BIREN: The State of California appropriates
24 money to fund the mail system. It did before HEERA existed.
25 It did before this order existed and there is no showing in the

1 record that there is any relationship between the order to
2 carry this mail and the type of funding they received for the
3 mail system.

4 QUESTION: So far as you can see, the University will
5 get the same line item, if it is a line item, for carrying
6 mail, even after this as before?

7 MS. BIREN: To the extent that the record deals with
8 this matter, that seems to be the case. There is no showing
9 that made any difference.

10 QUESTION: The line item meaning what? 100 percent?

11 MS. BIREN: Right.

12 QUESTION: 100 percent of whatever mail they carry
13 gets paid for by the State.

14 MS. BIREN: That's right.

15 QUESTION: The State has told them to carry the mail
16 and the State is going to pay for 100 percent of the carriage.
17 Bingo. It seems to me that is all the regulation requires,
18 isn't it? Isn't that compensation? How could it be not
19 private carriage? The State is directing the carriage by the
20 University and is paying the University for doing the carriage.

21 MS. BIREN: Because I think if you look at the
22 traditional interpretation of the meaning of compensation
23 within this exception, if you start from 1792, in the first
24 statute it talked about for hire or reward. It went through,
25 and there was an identifiable exchange of money, goods or

1 services between the user and the carrier.

2 The State here is no the user.

3 QUESTION: Do you have any cases that are even close
4 to this case?

5 MS. BIREN: No. Well, the only thing that is close
6 is the Advisory Opinion in 77(a) which allows the Indianapolis
7 School Board to carry the circular. Obviously, in terms of the
8 compensation they receive, the compensation for that mail
9 system is no different than the compensation here.

10 The State funds the mail system for the School Board
11 in Indianapolis. Or I am not sure exactly who funds it. But
12 the Government funds it.

13 Just following that through, staying with the private
14 hands without compensation exception, in 1846, in United States
15 v. Thompson, the paying for merchandise there was, on could see
16 it as pumped up to include the payment for the carriage of
17 letters.

18 This Court, in 1878, in Ex Parte Jackson, talked
19 about the purpose of the Postal monopoly as being to prohibit
20 carriage for hire.

21 In 1896, the Attorney General's Opinion talked about
22 traded services between railroads.

23 And in 1908, in the discussions in Congress about the
24 business of the carrier exception, they talked about their
25 understanding of the Postal monopoly, which was to prevent

1 carriage for profit.

2 Again, the intent of Congress here was to avoid
3 entrepreneurial competition with the Postal Service.

4 QUESTION: It would be one thing if the University
5 were here insisting that they had a right to do this under the
6 statute. But the University says no.

7 MS. BIREN: The University does say no. But I am
8 afraid I'm missing the import of your question.

9 QUESTION: It seems to me you would have a little bit
10 different case here if the University were on the other side of
11 the case and it was the University and the Unions against the
12 Government, in effect.

13 MS. BIREN: Are you talking specifically about the
14 private hands exception?

15 QUESTION: I'm talking about both. The business of
16 the University and the private hands.

17 MS. BIREN: Let me give you an example in return,
18 because I think it shows.

19 When a State law imposes a duty on an employer, it is
20 not always a happy thing. Suppose a developer had to fill out
21 environmental impact statements. They don't necessarily want
22 to do that. But it still their State law duty. It is still
23 part of their business. And I think that is analogous to the
24 situation here.

25 The University may not want to do it, but the State

1 has said, in the interests of society and in the University's
2 interests, and in the interests of the employees, they do need
3 to do this.

4 QUESTION: I don't know whether they want to do it or
5 not, but I suppose they want to obey the Federal law, too.

6 MS. BIREN: They do, indeed.

7 QUESTION: What if the University had been convinced
8 that they could legally carry this and wanted to, but they just
9 happened to be wrong. What does the Postal Service do? Do
10 they sue somebody or what?

11 MS. BIREN: It appears to me that what they do is
12 they inform them that they are carrying in error.

13 QUESTION: And they have informed the University
14 here, haven't they?

15 MS. BIREN: They have.

16 QUESTION: So the University has some grounds for
17 saying, let's be careful.

18 MS. BIREN: And that's why we're here. Precisely.
19 But our contention is that these two statutory and regulatory
20 exceptions provide for this type of carriage, because in the
21 business of the carrier exception, to do otherwise, we submit,
22 would simply be irrational and as we have said with private
23 hands without compensation it would be inconsistent with the
24 previous interpretation.

25 Now, it may well be that Congress may wish to expand

1 its definition of compensation from these identifiable goods
2 and services, but until it does so --

3 QUESTION: I haven't heard you argue yet that the
4 regulation here is invalid. Do you argue that?

5 MS. BIREN: Which regulation are we talking about?

6 QUESTION: The regulation on the letter.

7 MS. BIREN: No, I don't argue that it is invalid.

8 QUESTION: So it is a legitimate interpretation of
9 the statute?

10 MS. BIREN: Correctly interpreted to allow employees
11 to receive mail in the labor relations situation, yes.

12 QUESTION: But what if we disagree with you on the
13 interpretation of the regulation? Would you then say it is
14 invalid?

15 MS. BIREN: I think that the regulation is certainly
16 an expansion of the plain words of the statute. The plain
17 words of the statute say such as relates to the business of the
18 carrier.

19 We have not directly attached the validity of the
20 regulation and have assumed arguendo it is valid because we
21 believe that this carriage is appropriate under both the
22 statute and the regulation.

23 It is appropriate under the regulation because mail
24 is going to UC. The address says "University of California,"
25 to University of California employees. It is from a UC

1 employee representative organization. In this case, it was
2 also from a UC employee on the UC campus. And it is on
3 University business. And we believe that brings it within the
4 letter and the spirit of the regulation, as well as the
5 statute.

6 In the labor relations context, it would really be
7 unreasonable not to interpret it this way, because when you
8 talk about agency in terms of control of the employee response,
9 which the University has done in its brief, that is illegal in
10 the labor relations context.

11 And it is specifically illegal under the HEERA
12 scheme.

13 Rather, in this cooperative scheme, you have a
14 pluralistic university with many parts, and the employee part
15 has a role to play in decision making on terms and conditions
16 of employment.

17 In other words, there is a middle ground between an
18 identity of interest with management and a personal interest.
19 And that middle ground is the interest we find here, which is
20 of employees participating in the labor relations scheme
21 through their employee organizations.

22 QUESTION: I just wonder whether you could not, by
23 extending that reasoning, apply it to a business man and his
24 client. I mean, in the same sense that there is a symbiotic
25 relationship between the employer and the Union, there is the

1 same kind of relationship between a businessman and a client of
2 his and you could say that in facilitating the correspondence
3 of let's say a lawyer, facilitating the correspondence of one
4 of his clients with another client who are more or less in the
5 same businesses, he is really engaged in his own business in a
6 say so that if a large law firm got in the business of
7 distributing mail of its clients one to another, by parity of
8 reasoning with what you just told us, they are really parts of
9 a multi-faceted business arrangement.

10 MS. BIREN: But there are two distinctions.

11 The first distinction is that in this case the
12 business is State law duty. There is no State law bonding
13 between the client and the attorney in your example.

14 And secondly, in the regulation there is also the
15 necessity that it be to the carrier. And in your, I believe in
16 your hypothetical, it is not necessarily to the carrier. I'm
17 not sure who was carrying in your hypothetical.

18 QUESTION: That's right. That's right. It's from
19 one client to another. But yours is to the carrier only in the
20 address sense, that is, it is to somebody whose address is in
21 the University of California.

22 MS. BIREN: My argument is twofold in that case, too.
23 It is more than just the address, although I believe the
24 address is important. When you think of the administration of
25 this regulation, --

1 QUESTION: The President of the University of
2 California could not say "give me that letter" and open it up
3 and read it, could he?

4 MS. BIREN: Well, in fact, --

5 QUESTION: It is not addressed to him.

6 MS. BIREN: But under this exception, they do have
7 the right to monitor the mail. And so I am not sure it is at
8 all true that he could not open it up and look at it.

9 The University has claimed that that might subject
10 them to an unfair labor practice charge. But I would submit to
11 you that anyone can file a charge about anything. Whether or
12 not it leads to the issuance of a complaint and whether or not
13 it would be upheld by the Board is a totally different matter.
14 In a situation in which the University is compelled to monitor
15 this mail, I find it highly doubtful that PERB would decide
16 that it would be an unfair labor practice to monitor the mail.

17 So the distinctions I was pointing out were that it
18 was to the carrier in the sense of the labor relations scheme
19 that the employers are part of the components of the entity
20 that make business decisions; and it is to them in terms of
21 their address, as well.

22 I think it is important also to note that there is no
23 agency requirement on the face of the statute or the
24 regulation. It simply doesn't say that.

25 QUESTION: I wonder if that is right. Read the

1 second sentence of the regulation: "If the individual actually
2 carrying the letters is not the person sending the letters..."
3 and of course, here, it is not, "...or to whom the letters are
4 addressed..." and here it is not, "...then such individual must
5 be an officer or employee of such person."

6 MS. BIREN: That is talking about who carries the
7 letters.

8 QUESTION: Correct.

9 MS. BIREN: What they are saying is you cannot have a
10 subcontractor carrying these letters, it has to be a regular
11 employee of the University.

12 QUESTION: No, a regular employee of either the
13 addressee or the sender.

14 MS. BIREN: Exactly.

15 QUESTION: And he isn't here. The carrier is not an
16 employee of the Union which originates the letter nor is that
17 individual an employee of the addressee of the letter.

18 MS. BIREN: Our contention is that in the sense that
19 the employees here represent part of the University that makes
20 its business decisions on labor relations, that that carrier is
21 being employed by the University. And they are part of the
22 University.

23 QUESTION: You are assuming that the addressees are
24 the University, then?

25 MS. BIREN: Oh, yes. The addressees were at the

1 University.

2 QUESTION: You are saying the letters are addressed
3 to the University?

4 MS. BIREN: They are addressed to the University.

5 It says here, William Wilson, U.C., Berkeley. So it
6 is addressed to the University. But also, that they
7 participate in this decision making. And as I said, if the
8 agency concept is pushed to its outer limits, I think you could
9 see them as agents of the entire University, in that it is
10 under HEERA, the specific responsibility of the University to
11 foster and environment in which the employees can participate
12 to the fullest in the labor relations scheme.

13 QUESTION: Making that argument, what if the State of
14 California, or the Legislature, passed a statute saying it is
15 part of the responsibility of the University to foster good
16 neighborhood relationships and one way to do that will be to
17 add to the business of the University delivery of free mail to
18 everybody within five miles of the campus?

19 Would that be then part of the business of the
20 University?

21 MS. BIREN: Certainly it would be a State law duty
22 of the University, and to that extent, it would be the business
23 of the University.

24 The letters, I believe, in your example, would not be
25 from the University or to the University, though.

1 QUESTION: They would be people who are neighbors of
2 the University.

3 MS. BIREN: But that is not to or from the
4 University. Those are the kind of through letters that are
5 talked about in the Attorney General's Opinion. The letters
6 here were not through letters. They went to the University.

7 QUESTION: By reason of the statute, they have been
8 made part of the University, in the common enterprise of
9 fostering community relations, just as the Union, under your
10 theory, has been made part of the University by the labor laws.

11 Whenever laws push people together and require them
12 to deal with one another, you can develop a theory that there
13 are all part of the same agency. That is what I understand
14 your theory to be.

15 MS. BIREN: My theory is beyond that, because we are
16 not -- without having your entire statutory scheme about the
17 neighborliness before me it is somewhat difficult. But in this
18 situation, they are doing cooperative decision making on what
19 is patently the business of the carrier, which is the terms and
20 conditions of employment under which the carrier's employees
21 work.

22 QUESTION: From whom do these letters -- who sends
23 them and who receives them?

24 MS. BIREN: In this case, a University employee,
25 William Wilson, sent the letters to other University employees.

1 QUESTION: What was the subject of the letters?

2 MS. BIREN: The subject of the letters was an
3 organizing meeting.

4 QUESTION: To get people to join the Union?

5 MS. BIREN: Exactly. Exactly. And self organization
6 is explicitly one of the rights guaranteed to employees under
7 HEERA and one of the rights which the University is supposed to
8 help create the atmosphere for.

9 QUESTION: What if William Wilson sent another kind
10 of letter to another University employee that said let's
11 organize a camping trip next weekend? Is the reason that would
12 not be barred or would be barred by the private carrier
13 exception that it isn't the business of the University?

14 MS. BIREN: Well, it is not the private carrier
15 exception, it would be the business of the carrier exception.

16 QUESTION: Pardon me. The business of the carrier
17 exception.

18 MS. BIREN: Yes. It is not the business of the
19 University. It is a personal letter.

20 QUESTION: What if the Legislature then says we think
21 we should encourage all employees of the University to get out
22 in the great California park system and that is a State duty of
23 the University to encourage these people to get out?

24 Now, then, would that change it?

25 MS. BIREN: It would be then the State law duty and

1 yes, it would change it, but -- yes, it would change it. But
2 here we have a specific police power of the State involved,
3 labor relations, in which there is a strong interest in
4 having --

5 QUESTION: But the California Legislature surely has
6 any number of areas of authority over the State University of
7 California. Its police power is very, very broad, I would
8 think.

9 MS. BIREN: That is right. Its police power is
10 broad. But I think it does have an outer limit, at which point
11 the harmonization required between Federal law and State law --

12 QUESTION: Would you say it was beyond the competence
13 of the California Legislature to pass a statute saying that it
14 is the business of the University of California to encourage
15 its employees to get out in the wilderness over the weekend?
16 Would you say that that is just beyond the competence of the
17 Legislature?

18 MS. BIREN: No, I don't think it is beyond the
19 competence of the Legislature. No. But I am afraid I must be
20 missing the thrust of your question.

21 QUESTION: You agree then that with a letter from Mr.
22 Wilson of the circumstances I have described and with the
23 statute, could that be carried by the University mail system
24 without violating the Private Express Act?

25 MS. BIREN: It could be carried if it was

1 specifically the State law duty imposed by law and it was going
2 either from the carrier -- in other words from --

3 QUESTION: Mr. Wilson.

4 MS. BIREN: Well, it could be going from Mr. Wilson
5 to other agents of the carrier on the business of the carrier.
6 Yes.

7 But I think it is important to realize that labor
8 relations holds a very special place and that it isn't the case
9 that it is likely for California to pass that type of law. I
10 did do a great deal of thinking about those types of laws, in
11 preparing for this argument. And I think it is important to
12 realize that labor relations is a special subject and this
13 decision by the Legislature to foster these labor relations
14 puts this type of carrier in a special place.

15 And further, perhaps another distinction is that in
16 this statutory scheme, there is a special place for access,
17 that the facilitation of effective communication is
18 particularly important because of the problems in labor
19 relations that this Court knows about historically, of employee
20 organizations being able to communicate with their employees.

21 There is a long standing public policy in California
22 to allow in public employment this type of mail system
23 communication between public employees and their organizations.

24 There is a 1965 California Attorney General Opinion
25 on the subject.

1 And in the hypotheticals that you were propounding, I
2 don't think you will see that kind of long standing history.

3 QUESTION: Who wants to go camping by themselves?
4 You have to get some other people.

5 MS. BIREN: That's right. Well, through the U.S.
6 Mail.

7 If there are no other questions, I think I will take
8 my leave. Thank you very much.

9 CHIEF JUSTICE REHNQUIST: Thank you, Ms. Biren. The
10 case is submitted.

11 (Whereupon, at 2:56 O'clock p.m., the case in the
12 above-entitled matter was submitted.)

13

14

15

16

17

18

19

20

21

22

23

24

25

REPORTER'S CERTIFICATE

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

DOCKET NUMBER: 86-935

CASE TITLE: Regents of the University of California
v. Public Employment Relations Board, et al.

HEARING DATE: 1-12-88

LOCATION: Supreme Court, Washington, D.C.

I hereby certify that the proceedings and evidence
are contained fully and accurately on the tapes and notes
reported by me at the hearing in the above case before the

Date: 1-19-88

Margaret Daay

Official Reporter

HERITAGE REPORTING CORPORATION
1220 L Street, N.W.
Washington, D.C. 20005

RECEIVED
SUPREME COURT, U.S.
MARSHAL'S OFFICE

'88 JAN 20 P3:44