OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: NORTH STAR STEEL COMPANY, Petitioner v. CHARLES A. THOMAS, ET AL.; and CROWN CORK & SEAL CO., INC., v. UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC

CASE NO: No. 94-834 and No. 94-835

PLACE: Washington, D.C.

DATE: Tuesday, April 25, 1995

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IN THE SUPREME COURT OF THE UNITED STATES

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NORTH STAR STEEL COMPANY, :

Petitioner :

v. : No. 94-834

CHARLES A. THOMAS, ET AL.; :

and :

CROWN CORK & SEAL CO., INC., :

v. : No. 94-835

UNITED STEELWORKERS OF :

AMERICA, AFL-CIO-CLC :

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Washington, D.C.

Tuesday, April 25, 1995

The above-entitled matters came on for oral argument before the Supreme Court of the United States at 11:10 a.m.

APPEARANCES:

STEVEN B. FEIRSON, ESQ., Philadelphia, Pennsylvania; on behalf of the Petitioners.

LAURENCE GOLD, ESQ., Washington, D.C.; on behalf of the Respondents.

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MALCOLM L. STEWART, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Respondents.

C O N T E N T S

P R O C E E D I N G S

(11:10 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next -- spectators are admonished to remain silent until you leave the courtroom. The Court is still in session.

We'll hear argument next in Number 94-834, North Star Steel Company v. Charles Thomas and Crown Cork & Seal Company v. United Steelworkers.

Mr. Feirson.

ORAL ARGUMENT OF STEVEN B. FEIRSON

ON BEHALF OF THE PETITIONERS

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

This Court is once again confronted with the task of having to borrow a statute of limitations to fill in in another Federal statute for the situation where the Congress has failed to provide a limitations period.

In this particular instance, the statute is the Worker Adjustment and Retraining Notification Act, or WARN.

In creating WARN, the Congress took a right which already existed under the National Labor Relations Act for unionized employees -- that is, the right to advance notice of impending plant closings or mass lay-offs, first standardized the notice period to 60 days, and then extended that right of notice to nonunionized employees.

The ultimate goal behind both the notice provision in the National Labor Relations Act and WARN is to provide employees with the opportunity to do something to lessen the adverse effects brought upon them by this severe economic dislocation.

The fact that WARN follows the NLRA model has resulted in the regulations which have been drafted to govern WARN coming to a substantial extent from the National Labor Relations Act, and has also resulted in numerous court decisions which look to the National Labor Relations Act to try to fill in the interstices of WARN.

This Court in the past has counseled that in these type of borrowing situations, while there is generally a presumption in favor of State law borrowing, when a Federal source clearly provides a closer analogy and where the Federal policies at stake and litigation practicalities make that Federal source a significantly more appropriate vehicle, then the borrowing ought to come from the Federal source.

In this particular instance, with respect to the WARN act, we believe that you have a National Labor Relations Act which is by far a closer analogy than any which exists at State law, and we also believe that the

National Labor Relations Act both furthers the underlying purpose of the WARN act, that particular statute of limitations, and also would tend to avoid the kind of forum shopping and collateral litigation which would be inevitable if State law borrowing and also would tend to avoid the kind of forum shopping and collateral litigation which would be inevitable if State law borrowing goes along with the WARN act.

QUESTION: We really haven't borrowed very often from the National Labor Relations Act, have we?

MR. FEIRSON: No. This Court did borrow from the National Labor Relations Act, for example, in 1983 in DelCostello.

QUESTION: Yes.

MR. FEIRSON: But it has -- this Court, until fairly recently, simply didn't borrow very often from any Federal statute until the last 10 or 12 years.

QUESTION: I suppose you're going to get to this at some point, but will you comment specifically on why the NLRA is a better source, is subject to a better analogy than the Pennsylvania statute for payment of back wages due?

MR. FEIRSON: Yes. The fact that under the National Labor Relations Act one of the things that's going on is a balancing of interests -- that is, the interest of employees in getting notice, and then ultimately in seeking some type of benefit to aid them in the event of a plant closing and a mass layoff, and what the WARN act is attempting to do is almost precisely the same.

I mean, ultimately there are differences, to be sure, but ultimately the purpose behind both is to give employees notice so they can do something to help protect themselves against the loss of their job.

QUESTION: But the notice to the National Labor Relations Board is to invoke the board's procedure so that it can preserve the bargaining context over the short period of time when collective bargaining agreements often exist. It seems to me that's quite inapplicable to a money judgment, to a money claim for an employee.

True, the employee needs it as fast as he or she can get it for retraining, et cetera, but it seems to me that this is much more, frankly, like the Fair Labor Standards Act cause of action under Federal law. It seems to me that's the analogy.

MR. FEIRSON: Both under the National Labor Relations Act and under the WARN act it seems to me that the same goal is being pursued, which is not simply a collective bargaining goal under the National Labor Relations Act. I mean, yes there is a value in having the employer talk to employee organizations, but there is an end in mind, and the end in mind is to provide the opportunity to ameliorate the effects of a plant closing or a layoff, which is precisely what WARN is doing.

The FLSA does nothing more than say, the law says that when you work overtime you get paid time-and-a-half, and guess what, if your employer doesn't pay you time-and-a-half, you have a right to get the money that you earned. It has very little to do with this notice notion, and the use of the notice to somehow try to buffer the economic harm that's going to occur to employees when they lose their job.

QUESTION: I may have jumped ahead. It's not clear to me that if we agree that a Federal statute should apply, that we should make the determination of which statute at this level rather than remanding, but the analysis does seem to be tangled at almost every juncture. I suppose we look in part to how close the analogy is to the National Labor Relations Act in deciding whether to take the State or Federal law, but if we do that, then I think we probably also should look at the Fair Labor Standards Act.

MR. FEIRSON: Well, I believe the Court ought to look at all those acts. Again, though, the right -- there is a right that currently exists under the National Labor

Relations Act which is almost identical to the right which WARN gave to nonunion employees, which is a right to get notice of a plant closing, to prevent an employer from simply saying on Monday morning the plant is closed, so long.

QUESTION: That's pursuant to a collective bargaining agreement under the NLRA?

MR. FEIRSON: No. It's pursuant to -- it arises from the act itself. The act has been interpreted to require effects bargaining.

QUESTION: When you say the act, you mean the NLRA.

MR. FEIRSON: Excuse me, the NLRA requires effects bargaining. The NLRA requires the union and the employer to get together and to negotiate about the impact on employees when a plant closes, for example. In order to have effective effects bargaining, there has to be notice of the plant closing.

I mean, if the employer comes in, in my example, on Monday and says the plant's closed, it minimizes the ability to have effective bargaining, so under the National Labor Relations Act, for unionized employees there is this notice right. There is this right to learn about the plant closing before it happens.

QUESTION: But that's to facilitate collective bargaining.

MR. FEIRSON: But to facilitate collective bargaining to what end. Ultimately, the hope is, although not necessarily the expectation, the hope is that that collective bargaining process will result in something happening which will benefit the employees who are going to suffer from the economic dislocation.

QUESTION: Well, it depends, too, on what level of generality you're talking about. You could go back to the findings in 1935 and say the end is labor peace, but that doesn't really help you much in this case.

MR. FEIRSON: No, but in an effects bargaining situation, what's crystal clear is that when the union sits down with the management, what the union is seeking is some type of aid for the employees that are going to lose their jobs: severance pay, retraining, perhaps some type of concession to keep the plant open -- I mean, it's a very focused inquiry.

QUESTION: Yes, but what they're going to get is basically consensual, whereas here what you get is by statute.

MR. FEIRSON: No. What we would maintain is what you get here is consensual, too. The notice goes out under WARN, and the employees, if they're represented by a union, through their union representative, if they're not represented by a union, themselves individually or collectively, because they have -- the nonrepresented workers, the nonunion workers have section 7 rights. They have a right to act collectively.

They may elect a representative, they may go in a group, and what they attempt to do at that point -- and the whole purpose of WARN is to start to take action to protect themselves. One thing they can do is approach the employer and try to get some type of consensual understanding from the employer.

QUESTION: If we focus on those employees, the ones who aren't organized, there's a concern that might not be present if we were thinking of the union, so lay DelCostello to one side. This is a very short limitation period.

If we look at the NLRA, it's 6 months to file a charge, right, which is an administrative charge, rather easier than filing a court complaint. Think of unorganized employees, the ones you were saying could go alone, and the necessity of coming into a court with a Federal complaint in 6 months, isn't that extraordinarily short?

MR. FEIRSON: Justice Ginsburg, I don't believe so. This Court in DelCostello held that the 6-month period under the National Labor Relations Act applied to actions where an employee is suing his or her union and the employer arising out of the alleged breach of the duty of fair representation on the part of the union and the breach of the collective bargaining agreement.

In that particular situation, it seems to me that's even a more daunting prospect for an individual employee. He doesn't have the benefit of masses of people, his coemployees who are being laid off, he doesn't have the benefit, perhaps, if he's a nonunion employee and has union employees next to him, of the benefit of the union doing something. He's taken on the employer and the union, and this Court has held in that particular circumstance 6 months is enough time. Similarly --

QUESTION: That was all tied into, it's in the midst of bargaining.

MR. FEIRSON: Well --

QUESTION: Here you can't make that claim to the same extent. You certainly can't make it for the people who are not represented by the union.

MR. FEIRSON: Well, the filing of a 301 action in court, while it clearly has an impact later on the collective bargaining relationship because collective bargaining agreements are interpreted through a 301 action, it doesn't have a direct impact on the ongoing collective bargaining process.

I mean, there's a suit by an employee who says, I don't like the way my union represented me with respect to my rights under the collective bargaining agreement, and it's different.

Not only that, there is experience now under the WARN act, and there have been -- there has been a substantial amount of litigation filed within the 6-month period. In --

QUESTION: Well, and some cases are easy and some are not. I mean, the contingencies upon which the obligation may arise can be very difficult to untangle.

MR. FEIRSON: I --

QUESTION: And so the ease in some cases it doesn't seem to me is a good reason to assume ease in all.

Let me go back to another aspect of the analogy. One thing the NLRA does not do is to provide that if you fail to warn, you've got to pay 60 days' wages, and what we're dealing with is the case in which the policy of the act in fact is not realized, the warning is not given, and at that point it seems to me the employee is in exactly the same position as the employee who has not gotten paid for the last 60 days that he worked. He's owed 60 days' wages, and why for that reason isn't the analogy with the wage claim statute, and I will say a State wage claim statute, the strongest analogy?

MR. FEIRSON: Well, first of all, Justice Souter, you are entitled, an employee would be entitled under the National Labor Relations Act to back pay in that situation, so in other words, if you have two identical --

QUESTION: Yes, but he's -- the NLRA doesn't have any formula to the effect that if you fail, it's equal -- the failure is equal to 60 days' wages.

MR. FEIRSON: It is --

QUESTION: Does it?

MR. FEIRSON: No, but it can be greater. It can be greater or it can be lesser, depending on how many days --

QUESTION: Depending on the agreement.

MR. FEIRSON: Well, no, depending on how many days' wages were actually lost.

QUESTION: Yes.

MR. FEIRSON: But the concept is that in both the NLRA situation and in the WARN act situation, back pay for a failure to give notice is a remedy.

The problem with the Fair Labor Standards Act is that this whole notion of trying to find an analogy, as difficult as that notion is, and it is a difficult notion, it seems to me that it's premised on the concept that you want to find an analogous statute because if you find an analogous statute there is some thought that the Congress may have balanced the same sorts of interests. I mean, that -- otherwise it makes no sense to look for an analogy.

QUESTION: Well, maybe the thought is cruder than that. Maybe the thought is, we've been saying this long enough, so Congress may simply be assumed to assume that we will follow the rule that we look for the analogy, and if the analogy is there, that's the end of it.

MR. FEIRSON: But we have to define what we mean by analogy, and --

QUESTION: Yes, and a moment ago you were avoiding the analogy by referring to it as back pay. Another way of characterizing it is simply to say, under WARN you've got to go on paying for 60 days after you give the notice, and if you give notice in time, you're going to get 60 days of work out of that.

If you don't give notice in time, you may not get the 60 days of work, but you've still got to give 60 days of pay, so instead of being a back pay kind of statute, what it is, is in effect a guarantee of work or payment in the absence of work, and so it's not like a back pay statute, it's like a statute guaranteeing the payment of wages, e.g., the Pennsylvania Wage Collection Act.

MR. FEIRSON: In the Pennsylvania Wage

Collection Act, those wages are earned. People work. The wage payment and collection --

QUESTION: If they're not earned in this case, it's because the employer does not give the notice, so that if in fact the employer says, well, this case does not cry out for the same treatment, it is only because the employer has violated the statute, and that's why it doesn't cry out for the same treatment. Indeed, it cries out for at least as equitable a treatment.

MR. FEIRSON: It's not -- with all due respect, it's not necessarily linked to whether folks work or don't work. For example, the plant's going to close on September 1st no matter what. If you give notice 60 days before September 1st, you don't owe anything. If you don't, if you give 30 days, then you owe 30 days.

The time people work and the time they actually earn money is not dependent on the notice. The 60-day back pay remedy is a damage remedy, not for wages that have been earned, but which are not paid. They are damages flowing from a violation of the act. That is that the employer didn't do what the employer should have done. That is a base --

QUESTION: But those 60 days of wages are 60 days that -- that penalty is in lieu of wages which the employer could have paid in response for labor, if the employer had given notice at the time the statute says he's supposed to.

MR. FEIRSON: It is not --

QUESTION: Isn't that correct?

MR. FEIRSON: No.

QUESTION: Am I factually wrong on that? Maybe I am.

MR. FEIRSON: No -- well, I think -- I don't know if it's factually wrong. I think it's conceptually not correct in that what it is is a damage, is a liquidated damage remedy for failure to give notice. It's not in lieu of wages which have been earned or which would have been earned had notice been given.

The Congress came up with a liquidated damage provision.

QUESTION: Let me -- may I ask it this way? If the employer gives notice 60 days before closing, the plant functions for the 60 days, and closes. The employer pays the wages for the people who worked during that period, and that's the end of the matter. WARN has nothing more to day.

MR. FEIRSON: That's correct.

QUESTION: If the employer doesn't give the notice until 30 days before the closing, the act says to the employer, you have got to behave by paying wages just as if you had given notice at the proper time, which means you've got to pay another 60 days of wages, i.e., 30 of those for wages actually earned, and 30 for not earned, but it's -- isn't it therefore -- if that's the way the statute functions, isn't it fair to say that this statute creates a wage claim in order to enforce the notice requirement?

MR. FEIRSON: This may just be dancing on the head of a semantical --

QUESTION: Well, it's characterization.

MR. FEIRSON: And that's --

QUESTION: Isn't that a fair characterization?

MR. FEIRSON: No, and my answer to that would be no, because as soon as you say it's in lieu of wages, which is what you just said, as soon as you conceptualize that 30 days' damages is in lieu of wages, that means it's not earned. That means it's not like -- at its core it is not like the wage payment and collection law.

WARN is a notice state. The FLSA and the Pennsylvania wage and collection law -- I hope it's nothing I said.

(Laughter.)

MR. FEIRSON: I knew I wasn't doing especially well, but --

QUESTION: I was pretty sleepy, though.

MR. FEIRSON: Thank you very much.

QUESTION: -- prerogative of the Chief Justice.

MR. FEIRSON: So that, it is a difference between a statute which says workers are entitled to get the money they actually earn by their labors versus a statute, a notice statute which says to an employer, if you don't give notice you have to pay damages, and we're going to calculate those damages because we don't want a very long drawn-out process. That's one of the elements of the WARN act.

QUESTION: Under Pennsylvania law, suppose it's a disciplinary layoff. We had a case like that last year.

The employer says, you go -- for 10 days you're suspended, and the employee then wins that case, wouldn't there be a claim under the guarantee, the wage State law to say that my wages -- at least there are some State laws, we had one last year, that covered precisely that situation.

MR. FEIRSON: The Pennsylvania law would not cover that situation, would not give the employee wages for that period of suspension.

QUESTION: Well, what would? Is there no State law remedy if -- this is a wrongful layoff for discipline. Is there no State law claim that such an employee would have?

MR. FEIRSON: Let's assume for a moment that it's not a union employee with a just cause clause in the collective bargaining agreement, because if it was a union employee with such a clause, they could file a grievance and they could get paid for that.

Let's assume a nonunion employee, Pennsylvania's is an employee -- an employment-at-will State, and in that particular setting, the -- what the court would say is that the employee had no right to continue to be employed --

QUESTION: Then there would be no claim, you said.

MR. FEIRSON: There would be no claim. There would be no claim.

QUESTION: But there could be a claim under -- some State laws would protect workers, right?

MR. FEIRSON: Yes. My understanding is that there are certain State laws for payment of wages which include sort of these wrongful, either discharge or wrongful suspension notions, but they're relatively rare.

QUESTION: But that would be a case where on your theory, you're not getting paid for wages that you earned by being on the premises and doing the job, and still would come under a State statute that provides for --

MR. FEIRSON: That is correct, Justice Ginsburg, but again, conceptually that would be a damage provision. It might come within the statute, but it's different.

The basis of the Pennsylvania wage payment and collection law and the Fair Labor Standards Act, putting the penalty provisions in the Fair Labor Standards Act to one side for a moment, is the employees have earned this money.

They've worked for it and they haven't been paid it, and so these statutes give the employees the right to get the money they have actually earned by virtue of their labors, and that is different from the WARN act, which is a notice statute.

The reason why the National Labor Relations Act at least seems to us to be much more analogous is it has as an overlay -- admittedly it's a fairly narrow band, but it has as an overlay this notice right, and when -- if the Court goes to look for an analogy, it seems to us that the analogy the Court ought to be looking for is a notice statute, because it is --

QUESTION: Do I understand correctly the law that if we say your argument is plausible, and then you say the analogy to the State guaranteed wage payment law or to the Fair Labor Standards, those are also plausible, but for you to win you have to show that your analogy is not just as close, and not just closer, but clearly closer, significantly more appropriate.

So if we're in equipoise in that, or even if we find a preponderance, you lose. You have to come up with the equivalent to clear and convincing.

MR. FEIRSON: As long as this Court continues to adhere to the presumption that State law borrowing ought to be favored, that is correct.

QUESTION: And -- but one of your arguments, ultimate arguments is maybe we shouldn't have that presumption.

MR. FEIRSON: It doesn't -- I don't think in this particular case the Court need reach that far, but I don't think in light of what's happened over the last 10 or 12 years it makes a whole lot of sense any more, frankly.

QUESTION: Is that in part because we now have many more Federal statutes from which to borrow?

MR. FEIRSON: It is in part because of that, it is in part because the enunciated basis underlying the presumption is that Congress looks at what this Court does, and in the past when Congress looked at what this Court did it saw that it always borrowed from the State, and so when Congress didn't put a statute of limitations into a Federal statute, you should assume that the

Congress assumed there would be State law borrowing.

Given what's happened in the last 12 years, not only the decisions in this Court in DelCostello and agency holdings and Lampf, but also the fact that in 1990 Congress itself decided that it didn't much like State law borrowing, at least prospectively, to sit here today and say, geez, there's a lot of vitality to this State law borrowing rule, seems wrong.

QUESTION: But shouldn't the very change in 1990 make us cautious to -- for this -- from now on there's this default provision, and it's long. It's 4 years. So shouldn't that make us very cautious about reaching back for the time before we had that and change what that regime was?

MR. FEIRSON: The legislative history behind the 1990 enactment suggests that the reason why the Congress didn't make that retroactive was because it didn't wish to upset settled expectations with respect to statutes of limitations.

QUESTION: Well, the settled expectation would be what our case law was, clearly close and significantly more appropriate. We would be unsettling that expectation.

MR. FEIRSON: No, I -- my reading of what the legislative history suggests is that when they talked about settled expectations, they were talking about the fact that for numerous Federal statutes over the years there had become settled expectations as to what the statute of limitations ought to be, and to apply the 1990 act retroactively would be to say, for example in the Lampf case in theory you have 1 in 3 years.

And people are now out there and have been for, that's a relatively short period, for 3 or 4 years operating on a 1 and 3-year assumption if -- of course, it was passed in '90 so this is not a good analogy, but you wouldn't want to go back and undo that, because there are settled expectations about what the statute should be, and so that's the reason they didn't make it retroactive.

That's not to say that because they didn't make it retroactive that doesn't mean that Congress didn't understand that we'd continue along on this borrowing course, but it does seem to me to suggest that Congress was aware of what the tests were that had been enunciated by this Court in the decisions prior to 1990.

In fact, there's a -- I don't think you can call it more than a snippet of legislative history, but there is a snippet of legislative history in one of the House reports which says that the Congress recognizes that from that point forward the borrowing was going to be done on the basis of whichever State or Federal statute was most analogous. It doesn't seem to incorporate any type of presumption in favor of State law borrowing.

QUESTION: But is there -- that's what I wonder. I mean, isn't there another reason for State law, that it's sort of like the civil code?

I mean, States tend to have categories of things. They have sort of -- statute of limitations apply to dozens of statutes like the civil code does, and they're in the business of trying to categorize is this more like a tort, is this more like a contract, is it the civil code or the penal code or which code.

Well, the Federal Government just isn't like that, and so initially you'd have a much harder time if you throw every statute of limitations up for grabs. Rather, we look to the civil code -- we look to the State originally, you see, because that was their business, applying statutes of limitations from the State to Federal and State causes of action.

MR. FEIRSON: The problem, of course, is in many Federal statutes like this one there are no real analogues at the State level. This is sort of unknown at common law.

It's not the sort of thing -- I think there now may be four or five State closing laws, which means there are 45 States that don't have them. There's not a lot of experience in dealing with these multi-State types of statutes as compared to what the State normally does, which deals with causes of action which fall within the boundaries of the particular State and --

QUESTION: Well, but I mean, every Federal statute you should look to Federal law if that's the criterion. I mean, it's always obviously better to have one Federal law for a Federal cause of action, but we've never done that.

MR. FEIRSON: Well, that -- I would not argue that this Court has said that is the sole criterion, but this Court has said in articulating its test that --

QUESTION: That's one of the criterion.

MR. FEIRSON: Yes.

QUESTION: Is this a Federal statute that applies Nationwide?

MR. FEIRSON: No. No.

QUESTION: That's a criterion that doesn't --

MR. FEIRSON: No, but what I was suggesting is --

QUESTION: That doesn't do anything.

MR. FEIRSON: Is that one of the criteria is a desire for uniformity to avoid forum shopping and collateral litigation, and that is true that whenever you adopt from a Federal statute, that takes care of that particular problem, but that's one factor, but it is a factor, and it is a factor which would exist each time you borrowed from --

QUESTION: It's not a factor in deciding whether this particular Federal statute has some special reason for picking a Federal statute of limitation. Every Federal statute has that reason, so you know, the factors you should pick should be distinctive, and that is never distinctive.

MR. FEIRSON: No, but that is a factor which follows upon trying to pick the closest analogy, and if you find that in this case, for example, the National Labor Relations Act is a far closer analogy than anything available at State law, then you look at the other factors, and that would, indeed, weigh in favor of adopting it.

QUESTION: It may be a closer analogy, but not because it's national.

MR. FEIRSON: I didn't mean to suggest it was closer because it was national. What I meant to suggest was uniformity creates a uniform standard across the Nation and thus minimizes the forum shopping aspect.

To the extent that I have time left, I'd like to reserve it.

QUESTION: Very well, Mr. Feirson.

Mr. Gold, we'll hear from you.

ORAL ARGUMENT OF LAURENCE GOLD

ON BEHALF OF THE RESPONDENTS

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

If I could begin with DelCostello, it seems to me helpful to do so. As Justice Ginsburg pointed out, DelCostello was not simply a situation dealing with abstractions. The choice that was seen there in determining how to deal with those hybrid suit challenges to arbitration awards or grievance settlements was somewhere between 20 days, 3 months, 6 months, and 9 months, and the Court was very concerned in reaching its eventual conclusion to look at the range of choices that were suggested as clear analogies in both the State and Federal level.

Here, we're dealing with a mandatory wage standard or labor standard statute that generates a quite straightforward damage action for failures to act, and only a straightforward court damage action.

QUESTION: Why does the union have standing to challenge it, Mr. Gold?

MR. GOLD: The statute is quite clear in giving the union standing, associational standing to seek such liability, and that is the basis. We believe that

Congress in this kind of situation plainly has the constitutional authority to provide such associational standing.

I have a dual obligation, however. I'm also here on behalf of the North Star plaintiffs who were unrepresented, and obviously in that case you have an action by a group of individuals, each of whom plainly has standing to pursue the remedy that is provided, the monetary remedy provided to them.

I would emphasize, I know that it is not waivable, that the standing issue is not one that to this point has been pursued. It may well be the subject of a petition some day.

In terms of the kind of situation we have here, it seems to us that it's important to note two things. One, while the petitioners go back and forth, there is a norm, a Federal rule, and the norm is that State statutes are borrowed unless that would frustrate Federal policy or is at odds with the purpose or operation of the Federal law.

And secondly, that as I've indicated, this kind of cause of action for failure to provide wages, to provide employment, payment for employment or employment forgone, is a quite straightforward claim of the kind that the law has dealt with and that State law deals with normally by a range of statute of limitations which balance the needs of the plaintiff and the interests of the law and the needs of the defendant in an area of 2 to 4 or 5 years. That's what the gamut of State statutes that were suggested here would provide.

So far as we are aware, and so far as the petitioners have shown, a State law with a 6-month statute of limitation for this kind of employee claim is all but unheard of.

Secondly, we believe that the law in this Court is far more stable than the petitioners have suggested. Their argument in our view is really a one-case argument. It's Agency Holding Corp. v. Malley-Duff, the RICO case.

Aside from that, this Court has two lines of authority, one, State law applies, two, with regard to implied or common law causes of action that come out of or are brigaded with a Federal statute which has an express statute of limitation, the Federal law provides the rule.

QUESTION: Mr. Gold suppose that the Pennsylvania, or a State statute in a case involving WARN is really, we think, on all fours with, say, the Fair Labor Standards Act statute, the statutes serve precisely the same function, have almost the same types of provisions. Just suppose that. Would there be any reason in that case for us to say that we would borrow the

Federal statute?

MR. GOLD: Your Honor --

QUESTION: Under our existing jurisprudence.

MR. GOLD: Yes. We noted at the end of our brief as a final argument that if there was a Federal law borrowing rule, if you looked at all possible analogies, the Fair Labor Standards Act and the Portal-to-Portal Act are very, very close analogies indeed.

I think that the problem is that the petitioners are awfully cavalier about the unsettling effect of such a change on the decided cases. Except if you're going to go back to a regime of prospective overruling, the cases, the 1983 cases, the other cases would have to be revisited if you were to change from a State law presumption with these narrow exceptions to a Federal borrowing regime in general.

QUESTION: The fact that there is a Federal statute that parallels, say, most of the State statutes from which we would borrow would not be, say, special exception for escaping from our presumption?

MR. GOLD: If that could be done, I am not here to argue for the overall virtue of State borrowing. If we were at square 1, our only interest is that the search for the balance of interest and policies looks to the balance of interest that goes into statutes of limitation, not, as petitioners would have it, looking for a norm somewhere, anywhere, that looks like this norm without regard to what kind of enforcement system or what the purposes and policies behind the norm would be.

So I could not argue to you that the State law presumption or basic borrowing rule is of the essence to Federal jurisprudence. I would only argue that it is -- it has been established by this Court as the norm. It is read into Federal statutes as the intent of Congress except in narrow circumstances, and it produces rational statutes of limitations in this context whereas the suggestion of NLRA borrowing does not.

Beyond that, I can only say, as has been pointed out, that we're dealing with a wasting resource here. Starting for any statute after 1990 there is now a residual Federal rule, and against that background the question of revising the basic standard and unsettling those matters which have been settled, some of which drive a great deal of litigation like 1981 and 1983, may be a higher cost than is warranted in this case, where the State statutes really are very close to the most analogous Federal statute, which is the Fair Labor Standards Act.

QUESTION: Could we say, what's essential to your position in this case is that we reject the 6-month NLRA period.

MR. GOLD: Right.

QUESTION: For the rest, it's in one sense academic, because you'd meet any other conceivable limitation period, whether Federal or State.

MR. GOLD: Right, and I do think that when we have the discussion of the kind we do here about forum shopping and complexities, lawyers and clients should read the law books and do know the basic statute of limitations, and it is the rare case, one hopes, that these nice questions of perfect characterization come up.

That doesn't mean this Court can avoid those nice questions, but the essential point is precisely the one you've made, Justice Ginsburg.

From our perspective, when you look at this kind of claim, we ought to be found to have brought this WARN act case timely in just over a year, no matter whether it's a State borrowing rule or a Federal borrowing rule.

The NLRA analogy just doesn't fit because as this Court pointed out in Reed, and it would seem to us that it's difficult to come up with two cases that are closer in terms of a conceptual question of when you go to NLRA borrowing than this case and Reed, the fact that there is an overlap between the NLRA norm and another Federal statutory norm is not decisive. That isn't what this Court means when it talks about looking to the policies and purposes of the statute.

8(b)(1)a of the National Labor Relations Act covers a far greater fraction of Landrum Griffin title I 101 cases than the NLRA provisions cover with regard to WARN, and Reed quite rightly says that that isn't the test, the test is the policies that are peculiarly relevant to determining the proper statute of limitations.

The NLRA statute, as this Court explained in DelCostello and again in Reed, is a statute of limitation that has to do with protecting the formation and operation of collective bargaining agreements and private settlement through grievance arbitration, and to furthering stable ongoing bargaining relationships.

It's not easy for me to face up to this in argument, but somewhere between 75 percent and 85 percent of the people covered by the WARN act are not governed by any collective bargaining relationship. The purpose of the WARN act is to give those people not a chance to work out a private settlement, as Justice Kennedy has already pointed out, but an opportunity to adjust and retrain by having sufficient notice, and we haven't even mentioned the fact that the WARN act generates a notice to the affected community, which is so far removed from any conception of the NLRA as to have lost all touch with it.

The fact of the matter is, as this Court has recognized, albeit in the preemption context, but equally to the point here, that they're two very different classes of labor legislation, labor standards legislation which redounds to the benefit of all employees and sets norms that are nonwaivable, and are the product of the rules of the State, and the collective bargaining system, which aims to add a layer of protection and to forster a private resolution system.

The WARN act, like the Fair Labor Standards Act, like the Portal-to-Portal Act which is referred to in the legislative history here, is a labor standards statute which generates the kind of court litigation which has always been -- for damages, which has always been covered in the range of situations by statutes of limitation of 2 to 4 years, not the kind of statute of limitation in the NLRA which has a particular private agreement, private resolution system in mind.

Thank you.

QUESTION: Thank you, Mr. Gold.

Mr. Stewart, we'll hear from you.

ORAL ARGUMENT OF MALCOLM L. STEWART
ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,
SUPPORTING THE RESPONDENTS

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

I'd like to begin by touching briefly on two observations which have been alluded to in the earlier portions of the argument but that I think are especially crucial to the disposition of this case, and the first is that in determining whether the NLRA and the WARN act are analogous for purposes of limitations borrowing, the question is not whether the similarities between the statutes outnumber the dissimilarities, but as Mr. Gold has mentioned, the question is whether the statutes are similar with respect to those features which would be especially relevant to the choice of an appropriate limitations period.

And then the second point I'd like to allude to is one that Justice Ginsburg mentioned. That is, it's not simply coincidence or a fluke in this case that the actions filed would be timely under all of the statutes of limitations proposed except for that afforded by the NLRA.

Statutes on the order of 2 to 3 to 4 years are far more typical with respect to the filing of civil actions than is the 6-month period established by section 10(b), and I think that should lead the Court to conclude that there were some fairly unusual factors at work that led Congress to adopt the 10(b) limitations period, and the question is whether those factors are present in WARN act suits as well.

And I think the two crucial factors are first, as Mr. Gold mentioned, section 10(b), the NLRA generally is particularly concerned not with labor law in general, but with the process of collective bargaining and private dispute resolution under the terms of a CBA, and I think the contrast between DelCostello and Reed is telling.

This Court borrowed the NLRA, the section 10(b) limitations period when it was dealing with a case that implicated private dispute resolution under the collective bargaining agreement. In Reed it was dealing with the general field of labor law. It was even dealing with an area in which some of the primary conduct prohibited by title I was also an unfair labor practice under the NLRA, but the Court said in Reed that because the case did not touch upon the formation of the collective bargaining agreements or the private resolution of disputes thereunder, borrowing of the 10(b) limitations period was inappropriate.

I think the second point that's crucial in determining why 6 months is appropriate in the NLRA context is that the filing of an unfair labor practice charge requires simply the filing of a charge with an administrative body. The NLRB then takes responsibility for determining whether a complaint should be filed, and for prosecuting a complaint if one is pursued, and by contrast, a situation in which the responsibility is entirely upon the private litigant to file suit in Federal district court, the choice of such a short limitations period is less appropriate.

We recognize from DelCostello that we can't make the argument that borrowing a limitations period established for a limitations charge is never appropriate for filing a suit in court, because DelCostello held that sometimes it was, but I think if we look at the body of Federal employment statutes generally, we see a pretty clear pattern.

Those statutes like the NLRA, title VII, the ADEA, which require a litigant to proceed by filing an administrative charge, typically contain periods for doing so on the order of 3 to 6 months. Statutes, by contrast, such as the Fair Labor Standards Act, the Portal-to-Portal pay act, which require a litigant to proceed by filing a suit in court, typically contain a limitations period on the order of 2 to 3 years, and I think this body of law reflects a congressional judgment that typically a litigant should have more time when the responsibility is entirely upon him to pursue his claim by means of filing a judicial action.

The final thing I'd just like to touch upon, as Mr. Gold said, is that we think that the Court's presumption of Sate law borrowing has worked well.

We think that borrowing State law in this context would not create problems of disuniformity and unpredictability that are so extreme as to outweigh the presumption, but if the Court was particularly concerned with uniformity, we think that there are better ways of accomplishing that than by borrowing the NLRA statute of limitation, such as borrowing the limitations period in the Portal-to-Portal pay act, or establishing a generic characterization of WARN act claims that would apply in all States.

Thank you, Your Honor.

QUESTION: Thank you, Mr. --

QUESTION: Mr. Stewart, may I just ask one question? Assuming we agree with you, should we leave the judgment below in its present State, or should we send it back to the court and say, pick a particular statute? Shouldn't -- it's true, this case is going to be -- this case on that assumption would be upheld no matter which of the Pennsylvania statutes might apply, but shouldn't -- for the future, shouldn't there be a clear rule down in the Federal courts there?

MR. STEWART: Well, I -- with respect, I don't think it would -- that the proper disposition for this Court would be to send it back to the court of appeals and ask them to pick a statute.

That is, for the sake of predictability the Court obviously doesn't grant cert in a large number of cases, and when it does so, it typically wants to establish rules that will guide a lot of lower courts, so it might be appropriate for this Court to pick the proper rule.

But if this Court decides that it doesn't want to do that, then I think the proper disposition would simply be to say that suit would be timely under any of the plausible limitations periods, and leave it at that. I don't see a value that would be served if this Court didn't make the choice, but asked the court of appeals to do so.

QUESTION: Thank you, Mr. Stewart.

Mr. Feirson, you have a minute remaining.

REBUTTAL ARGUMENT OF STEVEN B. FEIRSON

ON BEHALF OF THE PETITIONERS

MR. FEIRSON: Quickly, I think it's important first to note that when we talk about a 6-month statute with respect to the WARN act, frequently it's going to be a lot more than 6 months. It's only 6 months if there's an absolute permanent plant closing.

Otherwise, in the more complicated situations that have been referred to -- for example, mass layoff situations -- there has to be a 6-month period of employment loss before the right accrues, so that in essence an employee may have as much as a year before they have to file suit. That's number 1.

With respect to title VII being an administrative agency and having 6 months to file and you don't have to bring a lawsuit, you do have to bring a lawsuit within 90 days of receiving your right-to-sue letter from the EEOC, so that within the employment laws there are a lot of short limitations periods.

And finally --

QUESTION: You've had your administrative toils, and you've had at least some guidance about what to do. You haven't -- you're just not out there alone.

MR. FEIRSON: Sometimes you are out there alone if it's the Equal Employment Opportunity --

QUESTION: To do that you have to go first to the EEOC. Here, the employee on your version would have to go directly into Federal court, not having gotten any guidance, any counseling, any aid from any administrative agency.

MR. FEIRSON: But if -- in both situations, whether you go to the administrative agency or you go to a lawyer to file suit, the critical -- it seems to me the critical issue in a statute of limitations context is when is it that you know you have the right, and in both situations you have to know you have the right within 6 months.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Feirson.

The case is submitted.

(Whereupon, at 12:02 p.m., the case in the above-entitled matter was submitted.)

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:

NORTH STAR STEEL COMPANY, Petitioner v. CHARLES A. THOMAS, ET AL.; and CROWN CORK & SEAL CO., INC., v. UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC

CASE NO.: No. 94-834 and No. 94-835

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BY Ann Mari Federico

(REPORTER)