

1956

P. S. Guss dba Photo Sound Products
Manufacturing Company v. Utah Labor Relations
Board and United Steelworkers of America, CIO :
Petition for Rehearing and Brief in Support Thereof

Utah Supreme Court

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Recommended Citation

Petition for Rehearing, *Guss v. Utah Labor Relations Board*, No. 8393 (Utah Supreme Court, 1956).
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IN THE SUPREME COURT
of the
STATE OF UTAH

P. S. GUSS dba PHOTO SOUND
PRODUCTS MANUFACTUR-
ING COMPANY,

Plaintiff,

— VS. —

UTAH LABOR RELATIONS
BOARD and UNITED STEEL-
WORKERS OF AMERICA,
INC.

Defendants.

FILED
MAY 11 1956

Clerk, Supreme Court, Utah

Case No. 8393

PETITION FOR REHEARING
AND BRIEF IN SUPPORT THEROF

PETER W. BILLINGS

Fabian, Clendenin, Moffat & Mabey

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IN THE SUPREME COURT
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P. S. GUSS dba PHOTO SOUND
PRODUCTS MANUFACTUR-
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— vs. —

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Case No. 8393

PETITION FOR REHEARING
AND BRIEF IN SUPPORT THEROF

PETITION FOR REHEARING

Comes now plaintiff in the above entitled mat-
ter and respectfully petitions this court for a re-
hearing of the decision heretofore entered on April
30, 1956 on the following grounds and for the fol-
lowing reasons:

I. The court erred in failing to consider and

apply the ruling of the Court of Appeals for the Tenth Circuit on the issues of this case.

II. A decision of the Supreme Court of the United States handed down since the case at bar was argued indicates this court erred in its interpretations of the Federal law.

III. The Utah Labor Relations Act (Chap. 1, Title 34, Utah Code Annotated, 1953) as construed by this court and the Utah Labor Relations Board is invalid if applied to the labor relations of the plaintiff in the case at bar because contrary to the National Labor Relations Act, as amended, and Article VI, clause 2 of the Constitution of the United States.

BRIEF IN SUPPORT OF PETITION FOR REHEARING

STATEMENT OF POINTS

POINT I. THE COURT ERRED IN FAILING TO CONSIDER AND APPLY THE RULING OF THE COURT OF APPEALS FOR THE TENTH CIRCUIT ON THE ISSUES OF THIS CASE.

POINT II. A DECISION OF THE SUPREME OF THE UNITED STATES HANDED DOWN SINCE THE CASE AT BAR WAS ARGUED INDICATES THIS COURT ERRED IN ITS INTERPRETATION OF THE FEDERAL LAW.

POINT III. THE UTAH LABOR RELATIONS ACT (CHAP. 1, TITLE 34, UTAH CODE ANNOTATED, 1953) AS CONSTRUED BY THIS COURT AND THE UTAH LABOR RELATIONS BOARD IS INVALID IF APPLIED

TO THE LABOR RELATIONS OF THE PLAINTIFF
IN THE CASE AT BAR BECAUSE CONTRARY
TO THE NATIONAL LABOR RELATIONS ACT, AS
AMENDED, AND ARTICLE VI, CLAUSE 2 OF THE
CONSTITUTION OF THE UNITED STATES.

ARGUMENT

POINT I. THE COURT ERRED IN FAILING TO
CONSIDER AND APPLY THE RULING OF THE
COURT OF APPEALS FOR THE TENTH CIRCUIT
ON THE ISSUES OF THIS CASE.

We note that the opinion of the court is based on the proposition that the alternative views reached by the New York Court in the Wags case (*N.Y. State Labor Relations Board v. Wags*, 130 N.Y.S. 2d 731), which follows the Supreme Court of the United States cases cited by plaintiff, and the California court in *Garmon v. San Diego Building Trades Council*, 291 P. 2d 1 were open to choice by this court as to the proper policy to pursue. We submit that this is not the case. The issue is an interpretation of a Federal Act. The National Labor Relations Act, as amended in 1947, and particularly section 10(a) thereof, leaves no room for application of a state statute. We submit that the particular question as to interpretation of the Federal Act has been passed on by the Court of Appeals for the Tenth Circuit in *Retail Clerks v. Your Food Stores*, 225 F. 2d 659 (1955) and is not open to this court.

Under *Erie R. Co. v. Tompkins*, 304 U.S. 64, a

federal court in a diversity case must apply the applicable state law. If no decision of the highest court of the state is available, it must apply the law as announced by intermediate state courts. *Fidelity Union Trust v. Field*, 311 U.S. 169. So here, the federal question is covered by federal law as announced by the Supreme Court of the United States. *Mondou v. New York, New Haven & Hartford RR Co.* 223 U.S. 1; *Anderson v. Atchison T. & Santa Fe RR.* 187 P. 2d 729 (California, 1947 FELA case); *In Re Hallinan*, 272 P. 2d 768 (California, 1955, Income tax case).

Since the Supreme Court of the United States has not expressly passed on the issue, decisions of the Court of Appeals for the applicable states should control. Any other approach would create the situation that different results might be obtained on the same Federal issue in Utah depending on whether the forum was a state or a Federal court. c.f. *Parker vs. U. S.* (DC Colo) 125 F. Supp 731.

We recognize that there are a number of equitable arguments that might be made criticizing the result contended for by plaintiff. We submit, however, that these policy arguments are for Congress and that no matter how compelling these equitable arguments may be, the question is not open to this court and the choice of views is not the issue to be resolved. The issue here is whether Congress has

occupied the field and whether section 10(a) of the National Labor Relations Act, as amended, precludes state action unless its conditions are met. To construe the state act to permit state action is to ignore the plain language of the Federal law.

We are presenting this petition for rehearing because the opinion of the court in the case at bar did not cite or mention the *Your Food Stores* case. It is respectfully submitted that that decision disposes of the issue so far as this state and other states within the Tenth Circuit are concerned, unless and until that decision is overruled or modified by the Supreme Court of the United States.

Because this court did not discuss the *Your Food Stores* case in its opinion, we are restating the facts of that case and the posture in which the issue was presented and resolved.

The *Your Food Stores* case arose in New Mexico. That state has no labor relations act with an administrative board to enforce the state policy, as is the case in Utah. Accordingly, the issue came up with respect to the state court's right to enjoin peaceful picketing which the union claimed was under the exclusive jurisdiction of the National Board. It is submitted that that issue is no different from the issue here as to whether the State Board may act where the plaintiff is engaged in interstate commerce and its labor relations are likewise with-

in the exclusive jurisdiction of the National Labor Relations Board. The *Your Food Stores* case involved three separate actions. In the first case, the authority of the state court to issue such an injunction was denied by the United States District Court under authority of the *Garner* case (*Garner v. Teamsters Union*, 346 U. S. 485). The decision of the Federal District Court was issued in May, 1954. (*Your Food Stores v. Retail Clerks*, 121 F. Supp. 329)

In July of 1954, some seven weeks after entering of the judgment in that case, the Regional Director of the NLRB advised both parties by letter that the store's interstate operations did not meet any of the newly announced "standards for the assertion of jurisdiction" and that the director was therefore refusing to issue a complaint against the store in response to the union's charges which had been filed with the Board. The same administrative action was refused for the same reason by the National Board in the case at bar. Thereafter, in the New Mexico case, the union resumed its peaceful picketing and the store again instituted an action in the state court and obtained another temporary injunction. The union then instituted an action in the Federal District Court to stay the injunction issued by the state court. The trial court refused to interfere with the state court injunction under

its interpretation of the Federal Judicial Code. On appeal the Circuit Court reversed, stating with respect to the point pertinent to the case at bar:

“Moreover, the refusal by the NLRB to entertain the instant grievance on its merits did not of itself alter the pertinent law thereby revesting the state court with authority to proceed. Amended Section 10(a) of the Act specifically provides what this Court deems to be the only way state authorities can be vested with authority now within the exclusive purview of the Act. *Unless and until there is an express ceding of jurisdiction to a proper state agency, exclusive jurisdiction remains in the federal agency.* For sake of order such must be true. Otherwise, an interminable problem of determining jurisdiction would exist, throwing needless confusion into an area clearly preempted by Congress.” (emphasis supplied)

The Court of Appeals for the Tenth Circuit also disposed of the policy argument, which apparently this court felt was compelling by means of a footnote quoting the following from the *Universal Car and Service Co. vs. IAM*, 35 LLRM 2088:

“If the jurisdiction of the state courts is to depend — not upon the Act of Congress and the actual jurisdiction of the NLRB — but upon the day-to-day or month-to-month discretionary exercise of jurisdiction by the Board, dependent upon changing budgetary conditions or upon its economic, social or political views at the moment, then neither the courts nor the litigants can know with any certainty where jurisdiction lies, nor

whether in a given case jurisdiction existing at the time of its commencement will continue until its final decision.”

We respectfully submit that the opinion of the Court of Appeals for the Tenth Circuit is clearly in point and the facts under which the issue was raised are not distinguishable. For that reason alone we feel it our duty to submit this Petition and ask this court to reconsider its opinion in light of that case.

POINT II. A DECISION OF THE SUPREME OF THE UNITED STATES HANDED DOWN SINCE THE CASE AT BAR WAS ARGUED INDICATES THIS COURT ERRED IN ITS INTERPRETATION OF THE FEDERAL LAW.

Since the case at bar was argued and submitted, the Supreme Court of the United States had had one other occasion to advert to the same issue of Federal-State relationship in the field of labor relations, *UMW v. Ark. Oak Flooring Co.*, US Supreme Court, April 23, 1956, 37 LLRM 2828. In that case the United Mine Workers had failed and refused to file with the National Labor Relations Board the data and affidavits required by section 9(f), (g) and (h) of the National Labor Relations Act, as amended. Under the express provision of that Act no certification of the union as the collective bargaining agent of the employees could be made or the jurisdiction asserted by the National Board unless and until the union complied with those filing requirements. The union engaged in

peaceful picketing to coerce the employer to grant recognition of the union. The Louisiana State court found the picketing to be illegal under Louisiana law and granted an injunction on the theory that since the National Board could not act, the Garner rule would not apply. *Arkansas Oak Flooring v. UMW*, 227 La. 1109, 81 So. 2d 413, 36 LRRM 2454. The Supreme Court of the United States granted certiorari and reversed, stating:

“The industrial relations between the company and its employees nonetheless affect interstate commerce and come within the field occupied by the National Labor Relations Act, as amended. The Labor Board is but an agency through which Congress has authorized certain industrial relations to be supervised and enforced. The Act goes further. The instant employer, employees and union are controlled by its applicable provisions and *all courts, state as well as federal, are bound by them.*

* * *

“Such being the case, the state court is governed by the federal law which has been applied to industrial relations like these, affecting interstate commerce and the state court erred in enjoining the peaceful picketing here practiced. * * *”

It is submitted that if the State of Louisiana cannot act where Congress has expressly prohibited the National Board from acting, *a fortiori*, the State of Utah, through its Labor Relations Board cannot act where the National Board merely, for budgetary

or other reasons, has, for the time being, declined to act.

POINT III. THE UTAH LABOR RELATIONS ACT (CHAP. 1, TITLE 34, UTAH CODE ANNOTATED, 1953) AS CONSTRUED BY THIS COURT AND THE UTAH LABOR RELATIONS BOARD IS INVALID IF APPLIED TO THE LABOR RELATIONS OF THE PLAINTIFF IN THE CASE AT BAR BECAUSE CONTRARY TO THE NATIONAL LABOR RELATIONS ACT, AS AMENDED, AND ARTICLE VI, CLAUSE 2 OF THE CONSTITUTION OF THE UNITED STATES.

To make clear plaintiff's position with respect to the Federal issues involved and the reason why this court is bound by the decisions of the Tenth Circuit in the *Your Food Stores* case, it should be pointed out that this court is, in effect, by its opinion construing the Utah Labor Relations Act to apply to labor relations which clearly affect interstate commerce and are clearly within the exclusive jurisdiction of the National Board. It is respectfully submitted that to so construe the Utah Act is inconsistent with the National Labor Relations Act, as amended and contrary to the Supremacy clause of the Federal Constitution.

CONCLUSION

It is respectfully submitted that a rehearing should be granted and that the order of the Utah State Labor Relations Board be reversed as being

beyond its power and contrary to the National Labor Relations Act, as amended.

Respectfully submitted,

PETER W. BILLINGS

Fabian, Clendenin, Moffat & Mabey